Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

H. SCOTT BORLAND
Petitioner,

v.

ERNEST A. EMERSON, QUAY WOOD, BRIAN MCRAE, GLENN ZOCH, AND LOUIS diDONATO
Respondents

On Petition For A Writ Of Certiorari To The United States Supreme Court

---

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82 pp

Questions Presented

1. Did the Supreme Court of Texas err in denying Petitioner's application for writ of error, when the Court of Appeals below failed to properly apply the no-evidence review standard, ignoring evidence that clearly supported the findings of the trial court?

2. Did the Supreme Court of Texas err in denying Petitioner's application for writ of error, when the Court of Appeals below failed to give proper deference to the fact-finding of the judge and jury at the trial level, ignoring evidence that clearly supported findings that Respondent Brian McRae was not entitled to qualified immunity, and when the Court of Appeals noted in its opinion that there was "some evidence" that Respondent McRae knowingly committed an act outside the bounds of his authority under the color of state law?

3. Did the Supreme Court of Texas err in denying Petitioner's application for writ of error, when the Appeals Court below adopted the no-evidence standard of review, admitted that there was "some" evidence that Respondent Brian McRae acted outside the bounds of his authority, but concluded that there was no evidence to support the judge and jury finding below that he was not entitled to qualified immunity?

4. Did the Supreme Court of Texas err in denying Petitioner's application for writ of error, when the Court of Appeals below adopted the no-evidence standard of review, analyzed the probable cause issue as to only statutory interpretation of the law in dispute, stated that the affiant on whose testimony the warrant was issued had no personal knowledge of any wrongdoing, and then concluded that the arrest amounted to mere negligence, ignoring the statutory and constitutional requirements for probable cause, including that the affiant must have personal knowledge and that a warrant cannot be based on a conclusory statement alone?

Names of All the Parties

Petitioner Scott Borland certifies, pursuant to U.S.SUP.CT. Rule 14(1)(b), 28 U.S.C.A., that the following is a complete list of the parties in this proceeding:

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(3) Ernest A. Emerson, Defendant/Respondent

(4) Quay Wood, Defendant/Respondent

(5) Brian McRae, Defendant/Respondent

(6) Glenn Zoch, Defendant/Respondent

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Table of Contents

Page

QUESTIONS PRESENTED i

NAMES OF ALL THE PARTIES ii

TABLE OF AUTHORITIES viii

CITATION OF REPORTED OPINIONS xiii

STATEMENT OF JURISDICTION xv

CONSTITUTIONAL & STATUTORY PROVISIONS xvi

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT AND AUTHORITIES 5

1. **The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below failed to properly apply the no-evidence review standard, ignoring evidence that clearly supported the judge and jury findings of the trial court.** 5

A. The court ignored evidence presented at the trial court level. 6

B. The court incorrectly applied the no-evidence standard. 9

1) It failed to give proper deference to the trier of fact. 9

2) The Court of Appeals failed to comply with the no-evidence standard in reviewing Mr. Borland's §1983 claim. 10

a. The elements of a §1983 claim . . 10

b. The Court Record 11

c. The Court erred in concluding there was no basis for a §1983 claim. 16

2. The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below failed to give proper deference to the fact-finding of the judge and jury at the trial level, ignoring evidence that clearly supported the judge and jury findings that Respondent Brian McRae was not entitled to the protections of qualified immunity, and when the Court of Appeals noted in its opinion that there was "some evidence" that Respondent McRae knowingly committed an act outside the bounds of his authority under the color of state law 17

A. All parties agreed that the trial court would make a determination of the qualified immunity defense's applicability, and the court concluded that Respondents did not qualify . . . 17

1) Elements of the Qualified Immunity Defense 17

2) The court concluded Respondents were not entitled to qualified immunity 18

B. Review of the trial court's decision must be given significant deference. 18

C. In misapplying the no-evidence standard, the Court of Appeals failed to give appropriate deference to the trial court and erred, as a matter of law, in overturning the court's denial of qualified immunity. 18

3. **The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Appeals Court below adopted the no-evidence standard of review, admitted that there was "some" evidence that Respondent Brian McRae acted outside the bounds of his authority, but concluded that there was no evidence to support the judge and jury finding below that he is not entitled to qualified immunity** 19

A. Respondent McRae was not engaging in a discretionary duty that would cloak him in immunity 19

B. Respondent McRae exceeded the scope of his own authority, by his own admission. 20

C. Respondent McRae did not act in good faith. . . 21

D. The Court of Appeals erred in concluding Mr. McRae was entitled to immunity as a matter of law. 21

4. **The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below adopted the no-evidence standard of review, analyzed the probable cause issue as to only statutory interpretation of the law in dispute, stated that the**

affiant on whose testimony the warrant was issued had no personal knowledge of any wrongdoing, and then concluded that the arrest amounted to mere negligence, ignoring the statutory and constitutional requirements for probable cause, including that the affiant must have personal knowledge and that a warrant cannot be based on a conclusory statement alone 22

A. The evidence below supported every element of Mr. Borland's false arrest claim. 22

1) The arrest was willful. 22

2) Mr. Borland did not consent to the arrest. 23

3) Mr. McRae had no legal authority to arrest Mr. Borland. 23

B. An arrest on a facially invalid warrant is, as a matter of law, unlawful. 24

C. The Court of Appeals improperly applied the no-evidence standard, and erred in concluding that the arrest was not unlawful. 25

CONCLUSION & PRAYER 26

APPENDIX A - Arrest Warrant 1a

APPENDIX B - Thomas Wine's Complaint 5a

APPENDIX C - Final Judgment of the District Court 6a

APPENDIX D - Findings of Fact 8a

APPENDIX E - Conclusions of Law 13a

APPENDIX F - Opinion of the Third Court of Appeals 15a

APPENDIX G - Correction to Opinion of the Third Court of Appeals 38a

APPENDIX H - Texas Supreme Court Denial of Writ of Error . 41a

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Anderson v. Creighton,483 U.S. 635 (1987) 17

Baker v. McCollan, 443 U.S. 137 (1979) 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13,17

Malley v. Briggs, 475 U.S. 335 (1986) 17

Mitchum v. Foster, 407 U.S. 225 (1972). 14

Whiteley v. Warden, 401 U.S. 560 (1971) 16

UNITED STATES COURTS OF APPEALS CASES

Beacham v. Annerino, 82 F.3d 420 (7th Cir. 1996), *unpublished* 5,16

Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986) 20

Courson v. McMillan, 939 F.2d 1479 (11th Cir. 1991) 17

Swint v. City of Wadley, 5 F.3d 1435 (11th Cir.), *cert denied*, 115 S.Ct. 1312 (1993) 14,17

UNITED STATES DISTRICT COURT CASES

Spiller v. City of Texas City Police Dept., 949 F.Supp. 486 (S.D.Tex. 1996) 5

TEXAS STATE SUPREME COURT CASES

Best v. Ryan Auto Group, Inc., 786 S.W.2d 670 (Tex. 1990). 6,9

Borland v. Emerson, et al., No. 96-1113 (Tex. 1997). 2

Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995) 6,9

City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994) 19,20

In re King's Estate, 244 S.W.2d 660 (Tex. 1951). 9

Litton Indus. Products, Inc. v. Gammage, 668 S.W.2d 319 (Tex. 1984) 10

Sears Roebuck & Co. v. Castillo, 693 S.W.2d 374 (Tex. 1985). 22

Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752 (Tex. 1970) 9

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994). 9

Tubelite v. Risica & Sons, Inc., 819 S.W.2d 801 (Tex. 1991) 10

TEXAS COURT OF CRIMINAL APPEALS CASES

Gordon v. State, 801 S.W.2d 899 (Tex.Cr.App. 1990) 25

Green v. State, 615 S.W.2d 700 (Tex.Cr.App.), *cert denied*, 454 U.S. 952 (1981) 25

Jones v. State, 833 S.W.2d 118 (Tex.Cr.App.), *cert denied*, 113 S.Ct. 1285 (1993) 25

State v. Martin, 833 S.W.2d 129 (Tex.Cr.App. 1992) . . . 24-25

TEXAS COURTS OF APPEALS CASES

City of Hempstead v. Kmiec, 902 S.W.2d 118 (Tex.App.—Houston [1st Dist.] 1995), *no writ* 5

City of Houston v. Newsom, 858 S.W.2d 14 (Tex.App.—Houston [14th Dist.] 1993), *no writ* 21

Emerson, et al. v. Borland, 838 S.W.2d 951 (Tex.App.—Austin 1992), *no writ*. xiii

Emerson, et al. v. Borland, 927 S.W.2d 709 (Tex.App.—Austin 1996), *writ denied* . . . . . *passim*

Esparza v. Diaz, 802 S.W.2d 772 (Tex.App.—Houston [14th Dist.] 1990), *no writ*. 20

F.N. Fausing Trading ApS v. Estate of Barbouti, 851 S.W.2d 314 (Tex.App.—Houston [1st Dist.] 1992), *writ denied* 6

Hyde v. State, 869 S.W.2d 660 (Tex.App.—Beaumont 1994), *writ ref'd* 25

Tieken v. Midwestern State Univ., 912 S.W.2d 878 (Tex.App.—Fort Worth 1995), *no writ*. 18

Wyse v. Dept. of Pub. Safety, 733 S.W.2d 224 (Tex.App.—Waco 1986), *writ ref'd n.r.e.* 20

TEXAS DISTRICT COURT CASES

Borland v. Emerson, et al., No. 435,470 (District Court of Travis County, 53rd Judicial District, September 13, 1994). xiii,1

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. IV. xvi,8,24

U.S. CONST., amend. XIV, §1. xvi

FEDERAL STATUTORY PROVISION

42 U.S.C. §1983 . . . . . xii,4,10

42 U.S.C. §1988 xiii

STATE STATUTORY PROVISIONS

TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (Vernon Rev. Civ. Stat. 1979 & Supp. 1997) 24

TEX. INS. CODE ANN. art. 5.43-1 (Vernon Rev. Civ. Stat. 1981 & Supp. 1985) 2,8

TEX. INS. CODE ANN. art. 5.43-1, §10 (Vernon Rev. Civ. Stat. 1981 & Supp. 1985) 3

RULES

U.S. SUP.CT. RULE 10(b) xv

U.S. SUP. CT. RULE 10(c) xv

U.S. SUP. CT. RULE 14(1)(b). ii

MISCELLANEOUS AUTHORITY

Michol O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65 (1974) 10

William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515 (1991). 10

CITATION OF REPORTED OPINIONS

This case was initiated on July 26, 1988, when Harry Scott Borland filed suit in Travis County District Court. (Tr. at 1.) His original action was brought for damages and other appropriate relief under 42 U.S.C. §1983 and §1988 "for violation of plaintiff's civil rights under color of State law." (Tr. at 4.) Mr. Borland also sought damages under wrongful imprisonment, wrongful arrest, intentional or negligent infliction of emotional distress, tortious interference with contractual relations, and for violation of the Fourth and Fourteenth amendments to the United States Constitution. (Tr. at 4.)

On October 4, 1992, the Austin Court of Appeals dismissed for want of jurisdiction an appeal of denial of a motion for summary judgment based on quasi-judicial immunity by the trial court below. The court of appeals held that it lacked jurisdiction because the lawsuit was filed prior the effective date of a statute which permitted the requisite interlocutory appeal. ***Emerson v. Borland***, 838 S.W.2d 951 (Tex.App.—Austin 1992).

On September 13, 1994, the Travis County District Court, 53rd Judicial District, signed a final judgment in favor of plaintiffs and against defendants. The effective date of the final judgment was extended to October 4, 1994. ***Borland v. Emerson, et al.***, No. 435,470 (District Court of Travis County, 53rd Judicial District, September 13, 1994).

On December 22, 1994, Defendants filed their Notice of Appeal. (Tr. at 951.)

On July 17, 1996, the Third Court of Appeals reversed the trial court's judgment and rendered a take-nothing judgment against Mr. Borland. ***Emerson, et al. v. Borland***, 927 S.W.2d 709 (Tex.App.—Austin 1996).

On August 16, Mr. Borland filed a motion for rehearing with the Third Court of Appeals. While the court corrected an erroneous footnote which served as the predicate for the false arrest charge, it

did not change its decision, and denied the motion for rehearing on September 18, 1996. ***Emerson, et al. v. Borland***, 927 S.W.2d 709 (Tex.App.—Austin 1996).

Mr. Borland then applied to the Supreme Court of the State of Texas for a writ of error, which was denied January 31, 1997. ***Borland v. Emerson, et al.***, No. 96-1113 (Tex. 1997).

STATEMENT OF JURISDICTION

On January 31, 1997, the Texas Supreme Court denied Petitioner's application for writ of error. The United States Supreme Court has jurisdiction over this case because the false arrest claim brought by Petitioner alleges violation of 42 U.S.C.A. §1983 as well as pertinent state law statutes. Pursuant to U.S.SUP.CT. Rule 10(b), 28 U.S.C.A., and U.S.SUP.CT. Rule 10(c), 28 U.S.C.A., this Court has jurisdiction over this matter.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. CONST., amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. XIV, § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C.A. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, excerpt that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a

declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW H. SCOTT BORLAND, Petitioner, and would show the Supreme Court that the Texas Supreme Court erred in denying Petitioner's application for writ of error, thereby failing to overturn the decision of the Court of Appeals for the Third Supreme Judicial District of Texas, which erred in reversing the judgment of the trial court that Respondents were not entitled to qualified immunity and that damages should be awarded.

STATEMENT OF THE CASE

This is an action for false arrest under Texas state law and for violation of federal constitutional rights under 42 U.S.C.A. §1983 arising after Petitioner, H. Scott Borland, was falsely arrested and detained on February 4, 1986. He was falsely arrested because the warrant used as the basis for his arrest had been withdrawn and, even if it had not been withdrawn, was insufficient on its face because it was based on an improper complaint. At all times relevant to this case, Respondents were state actors representing the State of Texas.

On September 13, 1994, the trial court found that all respondents violated Mr. Borland's civil rights and that, in particular, Respondent Brian McRae was not shielded by qualified immunity. The trial court awarded Mr. Borland $100,000 for past damages with pre-judgment interest in the amount of $87,297.63, $43,570.50 in attorney's fees, $5,000 in additional attorney's fees in the event of an appeal to the Court of Appeals, and another $5,000 in attorney's fees in the event of an appeal to the Texas Supreme Court. ***Borland v. Emerson***, No. 435,470 (Travis County District Court, 53rd Judicial District, September 13, 1994).

The State of Texas appealed, and on July 17, 1996, the Third Court of Appeals reversed the judgment of the jury and judge below, arguing that there was insufficient evidence to support a judgment. This opinion was based largely on the belief by the Court of Appeals that more than one warrant served as the basis for Mr. Borland's initial arrest. In a motion for rehearing filed August 16, 1996,

Petitioner corrected the court's impression in its motion for rehearing. While the Court of Appeals acknowledged its error in a revised footnote, it did not change its decision, and denied rehearing on September 18, 1996. ***Emerson, et al. v. Borland***, 927 S.W.2d 709 (Tex.App.—Austin 1996).

Petitioner moved for a writ of error to the Texas Supreme Court, and that court denied writ on January 31, 1997. ***Borland v. Emerson, et al.***, No. 96-1113 (Tex. 1997).

STATEMENT OF FACTS

For many years Petitioner H. Scott Borland sold personal, aerosol can-type fire extinguishers designed by a company called Fires Out, Inc. (FOF 24, 36.) Mr. Borland traveled around Texas and other states selling the fire extinguisher product. He purchased the product directly from Fires Out, Inc., a company in Hutchinson, Kansas, which has been engaged in the manufacture and sale of fire extinguishers for approximately 22 years. These extinguishers have been tested by General Laboratories, Inc. of Hutchinson, Kansas. (FOF 34.) General Laboratories reflects its testing of these products by authorizing the placement of its label on those products. (FOF 24.)

At all times material to this suit, Respondent Ernest Emerson was the State Fire Marshal, Respondent Lewis diDonato was General Counsel to the State Fire Marshal, Respondent Glenn Zoch was the supervisor for the State Fire Marshal's licensing division, Respondent Quay Wood was the manager of the State Fire Marshal's licensing division, and Respondent Brian McRae was an investigator for the State Fire Marshal's office.

The Respondents advised or acquiesced in and/or authorized others to advise Borland's customers, local police departments, and local fire marshal's offices of their erroneous position that the sale of Fires Out, Inc.'s fire extinguisher products were in violation of TEX. INS. CODE ANN. art. 5.43-1 (Vernon Rev. Civ. Stat. 1981 and Supp. 1985). Respondents even advertised and sent out a newsletter stating

that the sale of Fires Out, Inc.'s products were illegal. (FOF 28, 29, 30.) Specifically, Respondents sent out a newsletter dated January 1986 to local fire marshals and police departments. Defendant Brian McRae specifically asked Police Chief Thomas Wine of Columbus, Texas, to swear out a complaint against Scott Borland on the basis of the illegality alleged in the newsletter. (FOF 5; SOF 288.) Mr. McRae ordered Mr. Borland's arrest, even though he admitted he had no authority to do so. (FOF 5; SOF 69:20-70:4; 288:2-10.)

As a result of Respondent's actions, Mr. Borland was arrested on the warrant issued by the Columbus Police Department for violating TEX. INS. CODE. art. 5.43-1 §10. (FOF 3; Tr. 98.) Contrary to the Court of Appeals opinion, this was the **only** warrant upon which the arrest was made. (SOF 299.) That warrant was predicated upon an invalid complaint and was fatally defective. (COL 2; Tr. 850.)

Petitioner's detention lasted approximately five days. (FOF 2.) Mr. Borland was finally released on February 4, 1986, and all charges based upon the Columbus warrant were dropped. No further criminal proceedings are pending against Mr. Borland.

Mr. McRae ordered Mr. Borland's arrest, even though he had no authority to do so (SOF 69:20-70:4, 288:2-10), and the arrest was predicated solely on the defective Columbus warrant. (FOF 3, 14; SOF 299, 565.)

SUMMARY OF THE ARGUMENT

Petitioner H. Scott Borland was arrested on an improper warrant which was later rescinded. He was held in the Groveton, Texas, jail for five days, after which he was released and the charges against him that resulted in his arrest were dropped. The warrant at issue never was, at any point in time, a valid warrant for Mr. Borland's arrest, because it was based on a complaint sworn by a person with no actual knowledge of Mr. Borland's activities. Because this arrest was the culminating event in a year-long vendetta by an overzealous state fire marshal investigator acting well beyond

the scope of his authority, Mr. Borland filed suit alleging both a violation of 42 U.S.C. §1983 and of the state common-law tort of false imprisonment. The jury agreed that Respondent Brian McRae was a state official on the loose, who overstepped his authority in asking a local police chief to knowingly swear out a false complaint in order to justify the issuing of an arrest warrant. The jury found that McRae was not entitled to the defense of qualified immunity because of the egregious nature of his acts, and the trial judge found that none of the Respondents were entitled to the defense of qualified immunity. Mr. Borland was awarded $100,000 in damages, $87,297.63 in prejudgment interest, and $43,570.50 in attorneys' fees.

In error, the Court of Appeals reversed the judgment. The Court failed to give full weight to the evidence presented below in concluding that the evidence proved only mere negligence. To the contrary, a purposeful act is not a negligent act, and it was not mere negligence when Mr. McRae picked up a phone, called the Columbus Police Chief, described the person he wanted to have arrested, explained the section of law that he alleged Mr. Borland violated, and asked the Police Chief to swear out a complaint against someone he had never laid eyes on. Nor was it merely negligent that the police chief complied with McRae's request.

There is nothing in the record below which would indicate that there was anything remotely "objectively reasonable," about the actions taken by Resp. McRae. The Court of Appeals below erred initially when it incorrectly assumed that a second warrant, which appeared valid was used to make the arrest. However, in response to Borland's motion for rehearing, in a footnote, the appeals court later corrected its misstatement of the facts, but surprisingly did not overturn its previous opinion.

Mr. Borland is entitled to the jury award given him by the trial court below, and prays that this Court will uphold that judgment, overturning the decision of the Court of Appeals.

ARGUMENT AND AUTHORITIES

1. The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below failed to properly apply the no-evidence review standard, ignoring evidence that clearly supported the judge and jury findings of the trial court.

It is a matter of grave importance when a citizen lodges a complaint of false arrest against his government, and H. Scott Borland did not make such an allegation lightly. Petitioner is cognizant of the fact that the Constitution does not guarantee that "only the guilty will be arrested." ***Spiller v. City of Texas City Police Dept***, 949 F.Supp. 486, 490 (S.D. Tex 1996), *citing* ***Baker v. McCollan***, 443 U.S. 137 (1979).

Both by Constitution and statute, however, citizens are protected from the excesses of governmental authority, and that is precisely the case at hand. Several courts have examined the issue of warrant validity, and at least one has held that state officials are protected from immunity in a §1983 suit when the warrant is facially valid, even if it is later found to be defective. ***Beacham v. Annerino***, 82 F.3d 420 (7th Cir. 1996), *unpublished.* A Texas court has held that the chief of police was not liable for false arrest when he was acting within the scope of his official duties. ***City of Hempstead v. Kmiec***, 902 S.W.2d 118 (Tex.App.—Houston [1st Dist.] 1995), *no writ.* The ***Hempstead*** case is distinguishable from this one, however, because Defendants admittedly acted outside the scope of their authority. (FOF 8, 11.) Even more recently, a federal district court in Texas ruled that a warrant is valid when there is probable cause, and in that case the probable cause hinged on the fact that the officer, although he provoked it, actually saw the actions of the person being arrested. ***Spiller***, 949 F.Supp. at 489. In sharp contrast, the record below clearly indicates that Thomas Wine had **no** personal knowledge of the allegations leveled against Mr. Borland by Brian McRae. (FOF 4, 5, 7, 13.)

Mr. Borland's arrest and detention were so egregious that, after trial, a jury determined that Mr. Borland was entitled to damages, and awarded him $100,000 in damages, $87,297.63 in prejudgment interest, and $43,570.50 in attorneys' fees. The State of Texas appealed, and the Third Court of Appeals overturned the judgment of the court below. ***Emerson v. Borland***, 927 S.W.2d 709 (Tex.App.—Austin 1996), *writ denied.*

Because courts of appeals are not triers of fact, they are cautious in reviewing the decisions of courts below, and will overturn damages awards only when there is a clear abuse of discretion. ***F.N. Fausing Trading ApS v. Estate of Barbouti***, 851 S.W.2d 314 (Tex.App—Houston [Dist. 1] 1992), *writ denied.* The Court of Appeals erred, however, because it 1) failed to find any abuse of discretion on the part of the trial court below, 2) improperly applied the no-evidence standard in reaching its conclusion, and 3) substituted its reading of the facts for that of the judge and jury.

A. The court ignored evidence presented at the trial court level.

In its opinion, the court of appeals assessed Respondents' claim that there was no evidence to support the claim of deprivation of a constitutional right, to support the claim of false imprisonment. ***Emerson v. Borland***, 927 S.W.2d at 716-17. The Court then determines that in evaluating a no-evidence point it "must consider only the evidence and inferences tending to support the finding of the trier of fact and disregard all evidence and inferences to the contrary." ***Emerson v. Borland***, 927 S.W.2d at 717 (citing ***Burroughs Wellcome Co. v. Crye***, 907 S.W.2d 497, 499 (Tex. 1995) and ***Best v. Ryan Auto Group, Inc.***, 786 S.W.2d 670, 671 (Tex. 1990)). The Court correctly noted that it must construe all evidence in the record favorably toward the plaintiff ***Emerson v. Borland***, 927 S.W.2d at 717, but then mysteriously determined to pick and choose the evidence it would claim was in the record. In fact, the Court ignored evidence in the record central to the complaint in the case, even completely mischaracterizing the basis of Mr. Borland's claim.

For example, in Footnote 10 (Opinion at 17 (Appendix F), 927 S.W.2d at 718, the Court states: "The arresting officer testified without contradiction that Borland was arrested as a result of **both** the Columbus and Eagle Lake warrants." ***Emerson v. Borland***, 927 S.W.2d at 718, *emphasis added.* This is not true, and in its later, corrected opinion, the Court recognized its error. (Revised Opinion at 17 (Appendix G), fn 10, which deleted the phrase: "The arresting officer testified without contradiction that Borland was arrested as a result of *both* the Columbus and Eagle Lake Warrants." (emphasis in original), and replaced that phrase with: "Borland was apparently arrested as a result of *both* the Columbus and Eagle Lake warrants." (emphasis in original.)") But the record indicates that it is not "apparent" at all that both warrants played a role in Mr. Borland's arrest, and that is not, in fact, what Mr. Borland claimed. Police Sergeant Frank Braggs, who arrested Mr. Borland, said the stated reason for the arrest was "a warrant out of Columbus PD." (SOF 299:3, 559:4). He reiterated that later on by testifying that if it were not for the Columbus warrant, Mr. Borland would not have been arrested. (SOF 299:23-25.) The arrest report itself reflects the charges were "#1680 Columbus PD." (Tr. 99.)

This is not a minor technicality. If there was a valid warrant used to arrest Mr. Borland, then his entire claim fails. The critical issue in the case is that there was no valid warrant utilized as the basis of Mr. Borland's arrest. That fact creates a *prima facie* case of false arrest. If there was a valid warrant, then the fact that the Columbus warrant had been withdrawn would not matter; the fact that Resp. Brian McRae abused his power would not matter; the fact that Columbus Police Chief Thomas Wine swore out a complaint of which he had no personal knowledge would not matter. But all of those things do matter because it is the Columbus warrant, and no other, that was the basis for Mr. Borland's arrest on January 31, 1986.

The record is clear that the only warrant which was used to arrest Scott Borland was the one that was issued after a complaint was sworn by Chief Thomas Wine of Columbus, the swearing of that complaint having been initiated by Resp. Brian McRae. (Exhibit A,

Arrest Warrant; Exhibit B, Complaint of Thomas Wine.) That warrant was invalid. (COL No. 2.) By acknowledging its mistake of fact, and then failing to uphold the verdict, the appellate court erred, as a constitutional arrest required a valid warrant. U.S. Const.U.S. CONST., amend. IV.

The Court of Appeals further compounded the error by mischaracterizing the basis of Mr. Borland's invalid warrant claim. In its opinion, the Court of Appeals says that "Borland does not challenge the facial validity of the warrants." ***Emerson v. Borland***, 927 S.W.2d at 718. This is not true. In his reply brief to the Court of Appeals, Mr. Borland notes that, regardless of the Fire Marshal's interpretation of the law at hand, the warrant issued for his arrest was based on a complain sworn by Police Chief Tom Wine based solely on information given him by Defendant Brian McRae; Wine had no personal knowledge that could conceivably form the basis of his complaint and, therefore, the warrant is facially invalid as probable cause never existed. (Appellee Brief at 28.) In his motion for rehearing to the Court of Appeals Mr. Borland claims that the Columbus warrant "was predicated upon an invalid complaint and was fatally defective." (Appellee Brief in Support of Motion for Rehearing at 3.) The Court of Appeals is simply wrong when it claims that Mr. Borland did not challenge the facial validity of the warrant.

The Court's claim that Borland does not "complain that the complaints (i.e., affidavits) on which the warrants were based contained false statements" is misleading. ***Emerson v. Borland***, 927 S.W.2d at 718. Mr. Borland complains, and loudly, that the affidavits for the warrant were made by individuals without actual knowledge of any wrongdoing. They are inherently false as sworn statements. Mr. Borland does complain about the reliability of the statements on which the warrants were based.

Finally, the Court of Appeals says that Mr. Borland "contends instead that the complaints, and hence the warrants, were invalid because they were based on a misinterpretation of [TEX. INS. CODE] article 5.43-1 by appellants." ***Emerson v. Borland***, 927 S.W.2d at

718. It is true that misinterpretation of the statutes is an element of Mr. Borland's defense, but that is not the only argument made regarding the validity of the Columbus warrant. Mr. Borland claims that the warrant was issued only after Brian McRae told Thomas Wine to issue it (FOF 3, 5; SOF 286-87, 288, 292; Appellee Brief at 12, 14, 16, 20, 28; Appellee Brief for Motion for Rehearing at 7-8, 10). Mr. Borland argued all along, and the trial court concluded, that Chief Wine had no personal knowledge of any wrongdoing (FOF 3, 4, 5, 13), and that that constitutes the fatal flaw in the warrant that was used to arrest Mr. Borland. (COL 2.) In addition, Mr. Borland contends that the warrant had been rescinded before Mr. Borland was ever arrested, another indication of its invalidity.

B. The court incorrectly applied the no-evidence standard.

Even if Mr. Borland did argue that the basis for the warrant was misinterpretation of the statute, the evidence below clearly indicates that it was not "mere" misinterpretation but, rather affirmative acts of gross negligence that resulted in his detention. The Court of Appeals is simply incorrect to conclude that there is no evidence in the record to support this finding.

1) It failed to give proper deference to the trier of fact.

In its opinion, the Court of Appeals establishes the criteria for its consideration of a no-evidence point of error. First, the court must look only at the evidence and inferences tending to support the finding of the trier of fact, and must disregard all evidence and inferences to the contrary. ***Burroughs***, 907 S.W.2d at 499; ***Best***, 786 S.W.2d at 671. After reviewing such evidence, the court will uphold a judgment if more than a scintilla of evidence supports it. ***Burroughs*** at 499; ***Seideneck v. Cal Bayreuther Assocs.***, 451 S.W.2d 752, 755 (Tex. 1970); ***In re King's Estate***, 244 S.W.2d 660, 661 (Tex. 1951). Finally, the court noted that evidence supporting a finding amounts to more than a scintilla if reasonable minds could differ in their conclusions. ***Burroughs*** at 499; ***Transportation Ins.***

Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994). *See generally,* William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515 (1991); Michol O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65 (1974). Evidence that can equally be construed either way does not amount to a scintilla, however, and cannot support a judgment. ***Tubelite v. Risica & Sons, Inc.***, 819 S.W.2d 801, 805 (Tex. 1991); ***Litton Indus. Products, Inc. v. Gammage***, 668 S.W.2d 319, 324 (Tex. 1984).

Because the Court of Appeals does not sit through the trial, it should defer to the conclusions reached by the trier of fact—both the jury and the presiding judge—who are more likely to be able to evaluate the evidence and witnesses presented during trial.

2) The Court of Appeals failed to comply with the no-evidence standard in reviewing Mr. Borland's §1983 claim.

a. The elements of a §1983 claim

In the context of a criminal arrest, the elements of a §1983 claim require that the Respondent prove that (1) the person causing the denial of rights was acting under the color of state law and (2) that there was a deprivation of a constitutional right. 42 U.S.C. §1983.

Mr. McRae was acting in his capacity as an official with the State Fire Marshal's office, and Chief Wine was acting in his capacity as a police officer. The U.S. Constitution protects individuals from false imprisonment, unreasonable search and seizure, and guarantees due process rights.

The Court of Appeals is correct in arguing that "mere" negligence cannot give rise to a §1983 claim. But the knowing, deliberate and collusive ordering of an arrest warrant goes beyond "mere negligence." More importantly, it is not a misinterpretation of the law alone that Mr. Borland claims as the reason for the invalidity

of the warrant. The lack of personal knowledge by those swearing out the complaint and the usurpation of authority by Mr. McRae in ordering the arrest are the primary issues. (Appellee's Brief, p. 15.)

b. The Court Record

Mr. McRae admits when questioned by his attorney at trial that he has no authority to order an arrest:

> Mr. Barnes: Did you believe that it was in your authority as an investigator for the State Fire Marshal's Department to order or ask someone, or direct them, if you, to issue a warrant for someone who was in violation of the Fire Code?
>
> Mr. McRae: No, sir. I wouldn't even pretend to tell a police chief what to do in his city.
>
> Mr. Barnes: Are you aware of any statute that would have given you the authority to do so?
>
> Mr. McRae: No, sir.

(SOF 69:20-70:4.) Mr. McRae also denies that he ordered the arrest of Mr. Borland. (SOF 52:25.) Nonetheless, the trial court found that he did, in fact, order the arrest of Mr. Borland through a conversation with Columbus Police Department Chief Thomas Wine. (FOF 5.) Mr. McRae claims that the reason Chief Wine would implicate him in the arrest of Mr. Borland is because of the lawsuit in which Mr. McRae was involved. (SOF 54:8-17.) But Mr. McRae knew that Chief Wine was not a party to this lawsuit (SOF 54:18-20).

Thomas Wine, in his trial testimony, lays responsibility for the arrest squarely at the feet of Brian McRae:

Mr. Ozmun: Did Mr. McRae give you any instructions as to what you should do about the sale of these fire extinguishers?

Mr. Wine: Yes. He said that it was against the state law and had asked me to take out a warrant for a Harry Scott Borland for violation of this 5.43-1, Section 10, and charge him with — "selling prohibited fire extinguishers" would be the title of it—which I did.

Mr. Ozmun: I hand you what's been marked as Wine Exhibit No. 2. Can you tell the jury what that is?

Mr. Wine: That's the warrant that was taken out.

Mr. Ozmun: Is that an exact copy of the warrant?

Mr. Wine: Yes.

Mr. Ozmun: And you signed the complaint against Mr. Borland. Is that correct?

Mr. Wine: Yes.

Mr. Ozmun: On whose instructions did you sign that complaint?

Mr. Wine: Brian McRae of the State Fire Marshal's Office.

Mr. Ozmun: Did you have any other conversations with Mr. McRae regarding the sale of fire extinguishers or Mr. Borland?

Mr. Wine: For a couple of days there were numerous phone conversations between myself and Brian McRae.

Mr. Ozmun: And what were the substance of these phone conversations?

Mr. Wine: Trying to locate this Harry Borland.

(SOF 288:2-289:7.)

There is clearly some evidence, and most definitely the court is incorrect to conclude there is no evidence that Mr. McRae ordered the arrest of Mr. Borland in knowing violation of his authority to do so. The Court of Appeals is incorrect in its assertion that McRae's acts were simply part of his discretionary authority and that he is entitled to qualified immunity if his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Emerson v. Borland***, 927 S.W.2d at 719 (citing ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982) (emphasis in appeals court's opinion)).

The evidence cited above clearly establishes that Mr. McRae knew he did not have the authority to order the arrest of Mr. Borland, but Mr. Wine's testimony clearly indicates that Mr. McRae proceeded to do exactly that. It is inconceivable that there is "no evidence" to support the conclusion by the judge and jury below, and the court of appeals erred in holding that none existed. Quite to the contrary, the court of appeals noted that "there is some evidence that, based on the interpretation of the statute made by his superiors, McRae instructed Wine to arrest Borland." **Emerson v. Borland**, 927 S.W.2d at 719. The court wants to emphasize that the error is in the fact that McRae merely misinterpreted the law. The court wholly ignores the fact, and McRae's own admission, that not only did he not have the authority to have Mr. Borland arrested, but that he would never order such an arrest. Even the court of appeals concurs that there is "some" evidence that he did order the arrest, and committed error in concluding that there was none. The Texas

Supreme Court erred in failing to overturn the court of appeals' decision by denying writ.

Abuses such as those conducted by Mr. McRae underscore "the very purpose of section 1983 [which is] to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." ***Mitchum v. Foster***, 407 U.S. 225, 242 (1972). Mr. McRae used the power of his office to effect Mr. Borland's illegal arrest, which is precisely the sort of conduct §1983 claims are designed to remedy.

The court of appeals below noted that "qualified immunity is a powerful shield that will protect all but the plainly incompetent or those who knowingly violate the law." ***Emerson v. Borland***, 927 S.W.2d at 719 (citing ***Swint v. City of Wadley***, 5 F.3d 1435, 1442 (11th Cir. 1993), *cert denied*, 115 S.Ct. 1312 (emphasis in court of appeals' decision)). The evidence clearly permits a reasonable conclusion on the part of the judge and jury below that just such a knowing violation had occurred, which is exactly what happened. (FOF 5.) The court of appeals committed clear error in coming to a different conclusion, and the Texas Supreme Court committed error in not overturning the decision of the court of appeals by denying writ.

Even if Mr. McRae had not spoken to Police Chief Wine, there is other evidence at trial that he knowingly effectuated an arrest that was invalid. A trial Mr. McRae stated that he knew there was a question about the law (SOF 29), and that a warrant for a violation of whatever interpretation he gave the law had to be issued from Travis County, not from Trinity County (SOF 51). Mr. McRae even further assisted in the arrest of Mr. Borland because he provided police officers with the information that Mr. Borland would be in Groveton, and at about what time on the day of the arrest. (SOF 289:10.) In short, Mr. McRae was fully aware that he was operating outside the boundaries of the discretionary duties afforded him by

law. This is not "mere" negligence and meets the court's own test that such an act be committed knowingly.

Acting under the color of state law, Mr. McRae caused the arrest of Mr. Borland in violation of his due process rights. The court argues that failure to understand the law on which the arrest is based is merely negligence, and therefore does not rise to a §1983 claim. ***Emerson v. Borland***, 927 S.W.2d at 719. But the court confuses two issues with that conclusion. On the one hand, there is a question as to whether it was ever illegal to sell Fires Out extinguishers because of some concern about the interpretation of the law. (Appellee Brief at 5-7.) As a result, there is a question about whether the state should have arrested Mr. Borland—the court says this misinterpretation of the law results "at most, [in] a finding that appellants were negligent in the manner in which they decided that General Laboratories was not a nationally recognized testing laboratory." ***Emerson v. Borland***, 927 S.W.2d at 719. And negligence, the court goes on to say, "is not sufficient to support a section 1983 claim." ***Emerson v. Borland*** at 719.

But, as noted earlier, this conclusion misses the entire point of the legality of the arrest: the fact that a complaint was sworn out by Chief Wine, who had no knowledge of Mr. Borland's activities, at the request of Brian McRae, who had no authority to order such an arrest. Regardless of Mr. McRae's interpretation of the law, he never had the legal authority to arrest Mr. Borland, and Thomas Wine never had any personal knowledge of any of the allegations against Mr. Borland. Misinterpretation of the statute is not the sole basis of the false arrest claim: lack of authority and absence of a facially valid warrant is.[1] The Columbus warrant is the facially invalid warrant at issue here.

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[1] The fact that the jury singled out Mr. McRae from the other defendants indicates that jurors focused not on a misinterpretation of Article 5.43-1, but rather on Mr. McRae's extraordinary step of ordering Mr. Borland's arrest to make its finding. *See* Jury Finding No. 2.

Petitioner recognizes that when an arrest warrant is facially valid, it is difficult to sustain a valid §1983 action. ***Beacham***, 82 F.3d, 1996 WL 175079 at 2. But in this instance, the warrant is facially invalid, and an action is sustainable. As Petitioner argued in his brief for the court below, when the complaint consists of nothing more than the complainant's conclusion that the individual named therein perpetrated the offense described in the complaint, then the document alone cannot support the independent judgment of a disinterested magistrate that probable cause exists. Appellee's Brief at 15; ***Whiteley v. Warden***, 401 U.S. 560.

Thomas Wine had no knowledge of any wrongdoing on the part of Mr. Borland. Instead, he took as true those things Mr. McRae told him in order to swear out the complaint. (SOF 288:2-10.) Mr. McRae had no personal knowledge. The trial court concluded that the warrant was based on no personal knowledge (FOF No. 4), and that it was invalid (COL No. 2). Since this invalid warrant was the basis of Mr. Borland's arrest, and it was ordered by Respondent McRae, all the elements of §1983 are met.

c. The Court erred in concluding there was no basis for a §1983 claim.

In a light most favorable to the Appellee, there is ample evidence which would lead the jury to conclude that Resp. McRae, acting under the color of state law, went outside the bounds of his authority and ordered the arrest of Mr. Borland. He instructed Police Chief. Wine to swear out a complaint (SOF 288) when Mr. Wine had no personal knowledge of any activity on the part of Mr. Borland (SOF 288), and thereby created a situation in which Mr. Borland was arrested on an invalid arrest warrant. This is not "mere" negligence when construed in a manner most favorable to the Appellee, and clearly rises to the level of a deprivation of the constitutional right to due process by a state actor. This is sufficient basis for a §1983 claim, and the Court erred in concluding otherwise.

2. The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below failed to give proper deference to the fact-finding of the judge and jury at the trial level, ignoring evidence that clearly supported the judge and jury findings that Respondent Brian McRae was not entitled to the protections of qualified immunity, and when the Court of Appeals noted in its opinion that there was "some evidence" that Respondent McRae knowingly committed an act outside the bounds of his authority under the color of state law.

A. All parties agreed that the trial court would make a determination of the qualified immunity defense's applicability, and the court concluded that Respondents did not qualify.

1) Elements of the Qualified Immunity Defense

"Government officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know." ***Harlow***, 457 U.S. at 818. The Court of Appeals notes further that "if the contours of the right are not so clear that a reasonable official would understand that what he is doing violates that right, then qualified immunity will be found." ***Emerson v. Borland***, 927 S.W.2d at 719 (citing ***Anderson v. Creighton***, 483 U.S. 635 (1987).) Ultimately, qualified immunity is a broad blanket of protection that will shield "all but the plainly incompetent or those who **knowingly** violate the law." ***Swint***, 5 F3d 1435 at 1442 (emphasis added) (citing ***Courson v. McMillan***, 939 F.2d 1479, 1487 (11th Cir. 1991) (quoting ***Malley v. Briggs***, 475 U.S. 335, 341 (1986)).)

2) The court concluded Respondents were not entitled to qualified immunity.

The parties stipulated that the issue of qualified immunity would be submitted to the court for determination. The judge found that the Columbus warrant was invalid (COL No. 2), that Mr. Borland was wrongfully arrested and detained (COL No. 6), that there was no probable cause to arrest Mr. Borland (COL No. 7), and that Mr. Borland's Fourth Amendment rights were violated (COL No. 8).

Finally, the trial court found that the Respondents were not entitled to federal qualified immunity (COL No. 11), that their conduct was not objectively reasonable in light of the prevailing law at the time (COL No. 12), and that Respondents' conduct was such that no rational official would think it reasonable (COL No. 13).

B. Review of the trial court's decision must be given significant deference.

Courts of appeals have a limited role to play in reviewing the actions of trial courts below, largely because the justices on appellate courts were not there to view, in person, the events as they unfolded at the trial level. As a result, in our judicial system a court of appeals is not a fact finder, "and does not pass upon credibility of witnesses or substitute its judgment for that of trier of fact, even if there is conflicting evidence that would support a different conclusion." ***Tieken v. Midwestern State Univ.***, 912 S.W.2d 878, 884 (Tex.App.—Fort Worth 1995), *no writ*.

C. In misapplying the no-evidence standard, the Court of Appeals failed to give appropriate deference to the trial court and erred, as a matter of law, in overturning the court's denial of qualified immunity.

The Court of Appeals erred in concluding that Mr. McRae was entitled to immunity as a matter of law because neither the

no-evidence standard nor the legal sufficiency standard's first step requiring a no-evidence finding, was met. If Mr. McRae ordered an arrest, he knowingly overstepped his authority. (SOF 69-70.) He did order the arrest, and the arrest was executed on an invalid warrant. (SOF 288.) The trial record could lead the trial court judge to reasonably conclude that Mr. McRae knowingly, under the color of law, engaged in an activity which was beyond his scope of authority. The resulting arrest violated established constitutional rights and, therefore, the trial court reasonably concluded that Resp. McRae should be denied immunity.

3. The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Appeals Court below adopted the no-evidence standard of review, admitted that there was "some" evidence that Respondent Brian McRae acted outside the bounds of his authority, but concluded that there was no evidence to support the judge and jury finding below that he is not entitled to qualified immunity.

As the Court of Appeals noted, governmental employees are entitled tó official immunity from a suit which arises from performance of their discretionary duties in good faith as long as they are acting within the scope of their authority. ***City of Lancaster v. Chambers***, 883 S.W.2d 650, 653 (Tex. 1994). Mr. McRae was not performing a discretionary duty or acting in good faith; he was knowingly flouting his authority by ordering an arrest he could not legally order. As such, he is not entitled to the protections of qualified immunity, and the Court of Appeals was in error to conclude that he was.

A. Respondent McRae was not engaging in a discretionary duty that would cloak him in immunity.

The ordering of a warrant for the arrest of Scott Borland was not within Brian McRae's powers. (SOF 69-70.) Therefore, he was not performing a discretionary duty. To be quasi-judicial (or

official), activities have to be either ministerial (for which there is no immunity) or discretionary (for which there is immunity). *See* ***Esparza v. Diaz***, 802 S.W.2d 772, 779 (Tex.App.—Houston [14th Dist.] 1990), *no writ*. Discretionary actions are those that require personal deliberation, decision and judgment. Ministerial actions require obedience to order or the performance of a duty as to which the actor is left no choice. ***Wyse v. Dept. of Pub. Safety***, 733 S.W.2d 224, 227 (Tex.App.—Waco 1986), *writ ref'd n.r.e.*. The act of requesting the arrest of an individual when Mr. McRae admits he had no authority to do so is not a discretionary one. Immunity does not attach in these situations.

B. Respondent McRae exceeded the scope of his own authority, by his own admission.

Determination of whether a state actor has performed within the scope of his duties is essentially an examination of whether the functions performed are within the duties of the individuals in their professional position. In ***City of Lancaster***, officers were granted qualified immunity because a decision to engage in a high-speed chase is discretionary, and out of bounds only if the officers' actions in the pursuit are so reckless as to "shock the conscience" of the court. ***City of Lancaster***, 883 S.W.2d at 661. The court in ***City of Lancaster*** relied on ***Cannon v. Taylor***, 782 F.2d 947 (11th Cir. 1986), which determined that negligent, and even grossly negligent acts by police officers would not give rise to a §1983 claim; the court noted that the actions of the police in the high speed chase were not so "brutal" or "offensive to human dignity" to shock the conscience. ***City of Lancaster***, 883 S.W.2d at 661.

That Mr. McRae would knowingly use the powers of his office to call Police Chief Wine and ask him to swear out, without personal knowledge, a complaint against Mr. Borland, in order to effect an arrest that Mr. McRae could not order, is so "offensive to human dignity" as to shock the conscience. The fact that the judge and jury at trial, and the court of appeals, found "some evidence" that McRae had ordered this arrest means that the court below erred in concluding that no evidence supported the conclusion reached at trial.

C. Respondent McRae did not act in good faith.

To determine whether there was good faith "requires an inquiry into the permissible intentions of the police officer and the reasonableness of the officer's actions" in light of public safety. ***City of Houston v. Newsom***, 858 S.W.2d 14, 17 (Tex.App.—Houston [14th Dist.] 1993), *no writ*. While that case deals specifically with police officers, the requirements for an inquiry into the reasonableness of an official's actions would fit in any analysis of good faith.

The jury concluded that Mr. McRae was not entitled to official or quasi-judicial immunity. (Jury Finding No. 2.)[2] The trial record also clearly indicates the absence of good faith on the part of Mr. McRae. (SOF 263, 288.) Both of these findings are supported by the fact that Resp. McRae admitted he had no authority to order an arrest, (SOF 69:20-70:4) and Police Chief Wine's testimony that Resp. McRae did exactly that. (SOF 288:2-24.)

D. The Court of Appeals erred in concluding Mr. McRae was entitled to immunity as a matter of law.

The Court of Appeals erred in concluding that Mr. McRae was entitled to immunity as a matter of law because neither the no-evidence standard nor the legal sufficiency standard's first step requiring a no-evidence finding, was met. If Mr. McRae ordered an arrest, he overstepped his authority. He did order the arrest, and the arrest was executed on an invalid warrant. Jury findings, conclusions of law and the trial record all indicate that the jury could reasonably deny Mr. McRae immunity.

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[2] The fact that the jury singled out Mr. McRae from the other defendants indicates that jurors focused not on a misinterpretation of Article 5.43-1, but rather on Mr. McRae's extraordinary step of ordering Mr. Borland's arrest to make its finding.

4. The Supreme Court of Texas erred in denying Petitioner's application for writ of error because the Court of Appeals below adopted the no-evidence standard of review, analyzed the probable cause issue as to only statutory interpretation of the law in dispute, stated that the affiant on whose testimony the warrant was issued had no personal knowledge of any wrongdoing, and then concluded that the arrest amounted to mere negligence, ignoring the statutory and constitutional requirements for probable cause, including that the affiant must have personal knowledge and that a warrant cannot be based on a conclusory statement alone.

A. The evidence below supported every element of Mr. Borland's false arrest claim.

In order to prevail on a false imprisonment claim, Mr. Borland must prove (1) that there was a willful detention; (2) that there was a lack of consent on the part of the person detained; and (3) the absence of authority of law. ***Sears Roebuck & Co. v. Castillo***, 693 S.W.2d 374 (Tex. 1985). The jury found, based on more than a scintilla of evidence, that all three elements were met. The Court of Appeals therefore erred in concluding, as a matter of law, that the arrest was not unlawful.

1) The arrest was willful.

The jury answered in the affirmative for all Respondents on Question No. 3 in the jury charge: "Did any of the Defendants proximately cause the false imprisonment of Scott Borland?" Further, the second item in the trial court's Findings of Fact was the "Mr. Borland was arrested and detained for five days." (FOF 5.) Evidence in support of those findings is ample throughout the statement of facts; for example, Chief Wine testified that he had several conversations over several days with Mr. McRae at the Fire Marshal's Office in an attempt to locate Mr. Borland. (SOF 288-289.)

2) Mr. Borland did not consent to the arrest.

Mr. Borland disagreed from day one with the state's conclusion that he was selling his fire extinguishers illegally. ***Emerson v. Borland***, 927 S.W.2d at 713; Appellee's Brief, e.g. at 6-7, 9, 11-14; Original Pleading, Tr. at 1. Further, the continuing dispute over what constituted a nationally recognized laboratory underscores his objection to the state's perspective on the issue.

He clearly did not consent to an arrest based on what he would have considered to be a false charge. We can also presume that, since the trial court judge found no probable cause for Mr. Borland's arrest, there was no consent to the detention as well. (COL No. 7.)

3) Mr. McRae had no legal authority to arrest Mr. Borland.

The Court of Appeals concludes in error that "Borland does not challenge the facial validity of the warrants." ***Emerson v. Borland***, 927 S.W.2d at 718. To the contrary, facial invalidity is the precise challenge Mr. Borland made to the Columbus warrant. (Appellee's Brief at 15.) In short, the Court of Appeals misses the entire point, concluding, it seems, that the validity of the law on the books is the crux of Petitioner's false arrest claim. The Court of Appeals is completely in error.

Mr. McRae served as an investigator for the State Fire Marshal's office and knew he did not have the authority to issue or request an arrest warrant. (SOF 487:16-20; 488:7-8.) Nonetheless, he ordered Thomas Wine to issue one, as noted earlier. (SOF 288.) At the time he ordered the warrant to be issued, Brian McRae had no personal knowledge of any criminal activity on the part of Mr. Borland (FOF No. 5 & 7), nor did Columbus Police Chief Thomas Wine (SOF 288:2-10; FOF No. 4). Therefore, it is indisputable that as a matter of law the Columbus warrant was invalid.

The court next attempts to conclude that there was no problem with the Eagle Lake warrant, but then misstates the trial record. The arresting officer, Officer Bragg, testified (and the arrest record corroborated) that Mr. Borland was arrested solely on the basis of Warrant No. 1680 out of the Columbus Police Department; the Eagle Lake warrant had nothing to do with the arrest. In fact, Officer Bragg testified that Mr. Borland's arrest would never have happened except for the Columbus warrant. (SOF 299.) Petitioner takes no exception to the Eagle Lake warrant because that was not at issue in this case. Mr. Borland's complaint is of an arrest stemming from the Columbus warrant.

There was no authority of law for the Columbus warrant because it was issued based on an affidavit made by a police officer who had no personal knowledge of any criminal activity on the part of Mr. Borland. (FOF Nos. 3 & 4.) In short, the Columbus warrant was invalid, not only as to venue, but also as to probable cause (COL No. 2). There was, therefore, absence of lawful authority to detain Mr. Borland.

B. An arrest on a facially invalid warrant is, as a matter of law, unlawful.

The law concerning validity of warrants in Texas is very clear. Arresting officers are entitled to rely upon facially valid warrants in effecting an arrest. ***State v. Martin***, 833 S.W.2d 129, 130 (Tex.Cr.App. 1992). But to be valid, warrants must be based on probable cause. TEX. CODE CRIM. PROC. ANN. art. 38.23(b); U.S. CONST., amend. IV; ***Martin***, 833 S.W.2d at 130. The fact that the warrant was based on an invalid interpretation of the law is one reason why there was no probable cause for Mr. Borland's arrest. *See*, e.g., Appellee's Brief at 8-12. The record also clearly establishes that Mr. McRae knew that any warrant could only be issued in Travis County, and that a warrant issued in Trinity County was invalid. (FOF 9, 14,15, 17.)

More importantly, however, Mr. Borland's complaint also centers on the fact that the affidavit sworn by Chief Wine was done

without direct knowledge of any wrongdoing and, therefore, makes the warrant invalid. In reviewing the sufficiency of those affidavits, courts can look only to the "four corners of an affidavit." ***Hyde v. State***, 869 S.W.2d 660, 666 (Tex.App.—Beaumont 1994), *writ ref'd* (citing ***Jones v. State***, 833 S.W.2d 118, 123 (Tex.Cr.App.), *cert denied*, 113 S.Ct. 1285 (1993). A warrant issued on the basis of an affidavit which is merely "conclusory" in nature, or based solely on a sheriff's mere "conclusion" that an offense had been committed is not sufficient to establish probable cause, and the warrant is invalid. ***State v. Martin***, 833 S.W.2d at 131.

Chief Wine testified that the only knowledge he had of any alleged wrongdoing by Mr. Borland was information supplied to him by Mr. McRae. (SOF 288-289.) An examination of the "four corners" of the affidavit signed by Chief Wine reveals that all the affidavit says is that Mr. Borland "unlawfully and willfully selling [sic] prohibited fire extinguishers, 5.43-1 Sec. 10 IC [sic]." This is a wholly conclusory statement on the part of Chief Wine, and is not distinguishable from the conclusory statements that the Texas Court of Criminal Appeals struck down in ***Green v. State***, 615 S.W.2d 700 (Tex.Cr.App. 1981), *cert. denied*, 454 U.S. 952 (1981) or in ***Gordon v. State***, 801 S.W.2d 899 (Tex.Cr.App. 1990).

The Court of Appeals erred in concluding that the warrant was not facially invalid, and the Texas Supreme Court erred in not overturning that decision by denying Petitioner's writ of error.

C. The Court of Appeals improperly applied the no-evidence standard, and erred in concluding that the arrest was not unlawful.

For the Court of Appeals to conclude from the above testimony excerpts, findings of fact, and conclusions of law that there was "no evidence" of an unlawful arrest was clearly erroneous. Under the no-evidence standard (and the first step under the judicial sufficiency standard), the Court of Appeals must construe all evidence in a way favorable to the Petitioner, disregarding any other evidence. At a trial there is, of course, contradictory evidence

presented. Even if some of the evidence is open to more than one interpretation, the legal standard requires a review in support of the judgment. A warrant ordered by an individual to whom the state has not given the authority, who has no actual knowledge of a criminal act having been committed, and sworn out by an individual with no knowledge of any criminal act, hardly constitutes "no evidence" in support of a false imprisonment claim.

It is undisputed that the first element of a false arrest claim is met—Mr. Borland was detained for five days in the Groveton jail. It goes without saying that he did not consent to the detention, but his disagreement with the state's conclusion that sale of his fire extinguisher was illegal is further evidence that he did not consent to the charges being made. Finally, Mr. McRae acted outside the scope of his authority in ordering a warrant for Mr. Borland's arrest, and the warrant itself was invalid given the absence of knowledge by anyone involved of any criminal activity taking place.

Exhibits A and B, attached to Petitioner's Appellee's Brief in Support of a Motion for Rehearing to the Court of Appeals below, indicates that the affidavit sworn out by Chief Wine contained nothing more than conclusory information, and Chief Wine's own testimony proves that the he had no personal knowledge of the alleged wrongdoing. (SOF 288-289.)

A jury could very easily conclude or infer, and reasonably so, that an arrest made on insufficient grounds—absence of probable cause—that false imprisonment had occurred. The Court of Appeals erred in concluding that there was no evidence to support the trial court's judgment.

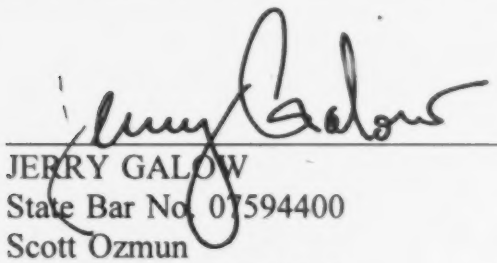
CONCLUSION AND PRAYER

The Court of Appeals erred in overturning the trial court's finding that Brian McRae was not entitled to governmental immunity and that Mr. Borland should take nothing in this false arrest claim, and Petitioner respectfully prays that this Court will overturn the decision of the Court of Appeals below.

WHEREFORE, H. Scott Borland asks this Court to grant Petitioner's Application for a Writ of Error and to overrule the opinion of the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

WHITEHURST, HARKNESS, WATSON,
LONDON, OZMUN & GALOW



JERRY GALOW
State Bar No. 07594400
Scott Ozmun
State Bar No. 15392740
P.O. Box 1802
Austin, Texas 78767
(512) 476-4346
(512) 476-4400 (FAX)
ATTORNEYS FOR PETITIONER

APPENDIX A

Arrest Warrant

Exhibit B
000096

AZCB 00055 AZCR 00101
01/31/88 12.20.36

SO COLUMBUS
70 GROVETON SO
ATTN: V.L. MCCLELLEND
COLOMBUS POLICE DEPT HOLD WRT #1680 ON HARRY SCOTT BORLAND W/M 6 FT. 5" 250 LBS BLOND HAIR BLUE EYES. FOR SELLING PROPERTY UNDER ARTICLE FIRE CODE 543.1 SEC, FOR 59 COUNTS. NOTIFY CHIEF TOM WINE WHEN SUBJECT IS IN CUSTODY ALSO NOTIFY WHEN READY FOR RELEASE, WE WILL MAKE ARRANGEMENTS FOR PICK UP.

AUTH: TOM WINE, CHIEF COLUMBUS POLICE DEPT
SO COLUMBUS COMM LTL 31/1220

/*illegible*

/*illegible*

/*illegible*

File No. 82446

IN JUSTICE'S COURT

PRECINCT NO. 1

of Colorado County.

THE STATE OF TEXAS

VS.

Harry Scott Borland

WARRANT OF ARREST
OR CAPIAS

Issued January 31, 1986

/s/Richard C. Schmidt J.P.

Precinct No. 1

Colorado County, Texas

WARRANT OF ARREST OR CAPIAS - J.P. COURT

THE STATE OF TEXAS

To any Sheriff, Constable or Peace Officer of the State of Texas, Greeting:

You are hereby commanded to arrest Hary Scott Borland if to be found in your County and bring him before me, a Justice of the Peace in and for Precinct No. 1 of Colorado County Texas, at my office in Columbus, Texas in said County, Immediately, then and there to answer the State of Texas for an offense against the laws of said State, to-wit: Selling Prohibited Fire Extinguishers 5.43-1 Sec. 10 IC of which offense __ he__, Hary Scott Borland, is accused by the written complaint, under oath of Thomas D. Wine filed before me.

Herein Fail Not, but of this writ make due return, showing how you have executed the same.

Witness my official signature, this 31 day of January, 1986.

/s/Richard C. Schmidt
Justice of the Peace,
Precinct No. 1, Colorado County, Texas

EXHIBIT D
000099

Name or Nickname: Borland, Hary Scott
Address: Box 13576, El Paso, Tex 79912
Marital Status: No
Sex: M
Age: 55
Date of Birth: 1-28-31
Weight: 225
Hair: Br
Eyes: Blu
State of Birth: Texas
Drivers License Number: */illegible*
#1680
Columbus RD
Arresting Officer(s): Braggs, McCleland
Place of Arrest: */illegible*
Time of Arrest: 3:25
Arrestee Ill or Injured?: No
Medical Air Required?: No
Next of Kin, Parent, or Guardian: None to report
Other Disposition and/or Remarks: Rest. Pd Chgs Drop
Name of Person(s) or, Firm Making Bond: Pd Restitution - Chgs dropped
Address & Telephone No. of Person(s) or Firm Making Bond:
Released 2-4-86
1/31/86
3:25PM
Bragge, McCleland
By: Bragge
Location of Arrested Person's Vehicle (if impounded) inventoried? No
Fingerprinted? No
Photographed? No
Authority: */illegible*

APPENDIX B

THOMAS WINE'S COMPLAINT

IN THE NAME AND BY THE AUTHORITY
OF THE STATE OF TEXAS

BEFORE ME the undersigned authority, on this day personally appeared Thomas D Wine who, after being sworn, upon oath deposes and says (that he has good reason to believe and does believe and charge) that one Hary Scott Borland on (or about) the 20th day of January, A.D. 1986, and before the making and filling of this complaint, In Justice of Peace Precinct No. 1 of Colorado County, State of Texas, did then and there unlawfully and wilfully* Selling Prohibited Fire Extinguishers 5.43-1 Sec.-10 IC against the peace and dignity of the State.

/s/Thomas D. Wine
Sworn to and subscribed before me this 20 day of January, A.D. 1988.

/s/illegible
Justice of the Peace, Precinct No.1
Colorado County, Texas

*—also "allege knowingly" when necessary

APPENDIX C

FILED
/illegible

FINAL JUDGMENT OF THE DISTRICT COURT

NO. 435.470

H. SCOTT BORLAND	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
ERNEST EMERSON,	§	
QUAY WOOD, BRIAN	§	
McRAE, GLENN ZOCH	§	
AND LEWIS diDONATO	§	53RD JUDICIAL DISTRICT

FINAL JUDGMENT

On the 9th day of May, 1994, the above-styled cause came to be heard before the 250th Judicial District Court in Travis County. H. Scott Borland appeared as the Plaintiff in the cause, represented by attorneys of record Jerry Galow and Scott A. Ozmun. The Texas Attorney General's Office through Assistant Attorneys General Leo Barnes and Jose Rangel appeared as counsel of record for Ernest Emerson, Quay Wood, Brian McRae, Glenn Zoch, and Lewis diDonato. Defendants had been properly served, then answered and were provided notice of trial by the Court. Plaintiff and all of the Defendants announced ready for trial. By jury demand, came a panel of good a lawful men and women, who after being duly impaneled and sworn, constituted the jury in this case.

The jury heard the witnesses, the presentation of evidence and the argument of counsel. On the 16th day of May, 1994, the jury retired under instruction of the court to consider its verdict and answers to the questions submitted by the Court. On the 16th day of May, 1994,

the jury returned to the Court the verdict and answers to questions numbered one, through four. The charge of the court and answers of the jury to the questions submitted to them by the court are by *reference* incorporated herein for all purposes as fully and completely as if the same were here set forth verbatim.

The jury's verdict was received and accepted by the Court and ordered filed herein. The Court ordered the jury discharged on May 16, 1994. Based on the answers to questions one and three. Defendants are jointly and severally liable for the damages awarded to H. Scott Borland.

Based on the jury's findings of damages, the Court finds the Defendants liable for $100,000 for past damages with pre-judgment interest in the amount of $87,297.63.

The Court finds that Defendants are further liable for Plaintiff's reasonable and necessary attorney's fees in the amount of $43,570.50. In the event of an appeal to the Court of Appeals, an additional $5,000.00 is awarded. In the event of an appeal to the Supreme Court, and additional $5,000.00 is awarded.

The Court finds that all costs of Court should be assessed against Defendants. Furthermore, post-judgment interest applies to the above amounts as required by law and shall continue to accrue on said amounts until paid.

It is finally, **ORDERED, ADJUDGED, AND DECREED** by the Court that the relief specified above is hereby granted, and, as to all parties and issues in this case, all relief not specifically granted herein is expressly denied.

Signed on the 13th day of September, 1994.

/s/John K. Dietz
THE HONORABLE John K. Dietz
JUDGE PRESIDING

APPENDIX D

FILED
NOV 15, 1994
IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
AMALIA RODRIGUEZ-MENDOZA, CLERK

FINDINGS OF FACT
Signed and Filed, November 15, 1994

NO. 435,470

H. SCOTT BORLAND	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
ERNEST EMERSON,	§	
QUAY WOOD, BRIAN	§	
McRAE, GLENN ZOCH	§	
AND LEWIS diDONATO	§	53RD JUDICIAL DISTRICT

FINDING OF FACT

1. The parties stipulated that the federal qualified immunity issues would be submitted to the court for determination.

2. Mr. Borland was arrested and detained for five days.

3. Mr. Borland's arrest was based upon a warrant issued out of Columbus, Texas by Chief Tom Wine.

4. The Columbus warrant was not based upon personal knowledge.

5. The Columbus warrant was issued upon the order of State Fire Marshal Office official, Defendant Brian McRae.

6. Mr. McRae was at all times relevant following the procedures of the State Fire Marshal Office in ordering the arrest of Mr. Borland.

7. Mr. McRae has no personal knowledge that Mr. Borland had committed any crime.

8. No person in Mr. McRae's position could objectively reasonably believe that they had the right to request or order the arrest of Mr. Borland or order that a warrant be issued for his arrest out of Columbus, Texas.

9. No objective, reasonable person could believe that Mr. Borland had committed any crime upon which a warrant could issue from Columbus, Texas.

10. No objective, reasonable person could believe that Mr. Borland had broken any laws via his sales of the fire extinguishers.

11. No objective, reasonable person could believe that the State Fire Marshal Office had the authority to order the arrest of Mr. Borland in this case.

12. No objective, reasonable person could believe that the Fires Out! fire extinguisher was an illegal product.

13. When requesting the arrest of Plaintiff, Defendant McRae did not tell Chief Wine 1) that he knew of no definition for "nationally recognized testing labs"; 2) that the State Fire Marshal Office had no lists of "nationally recognized testing labs"; 3) that officials of the State Fire Marshal Office disagreed on what were "nationally recognized testing labs"; 4) that the State Fire Marshal Office had never held a hearing to determine the legality of the product, 6) that Fires Out! had disputed the State

Fire Marshal Office's construction of Texas law for years prior to Mr. Borland's arrest, or that 7) a warrant must issue out of Travis County for a violation of 5.43-1.

14. Any objectively reasonable official would know that the warrant issued out of Columbus was invalid.

15. Any objectively reasonable official would know that venue for any violation of 5.43-1 of the Insurance Code is in Travis County.

16. Any objectively reasonable person would know that the First Out! extinguisher was exempt from regulation under § 5.43-1 of the Insurance Code pursuant to § 6 (d).

17. The Columbus warrant was not issued out of Travis County.

18. The State Fire Marshal Office had no criteria for establishing what were "nationally recognized testing labs" as set forth in 5.43-1 of the Insurance Code.

19. The State Fire Marshal Office had no lists of "nationally recognized testing labs" that they used to determine compliance with the law.

20. The employees of the State Fire Marshal Office had different personal beliefs of what were "nationally recognized testing labs."

21. There are no criteria for testing known to the State Fire Marshal Office for "nationally recognized testing labs."

22. That State Fire Marshal Office believed the "nationally recognized testing labs" standard to be difficult for a lab to prove and nearly impossible for the State Fire Marshal Office to disprove.

23. There had never been any complaints to the State Fire Marshal Office about the Fires Out! extinguisher not functioning properly, not functioning as claimed or harming anyone.

24. Fires Out! extinguishers had been sold in Texas for many years prior and subsequent to Mr. Borland's arrest.

25. No hearing was ever held by the State Fire Marshal Office to determine the legality of Fires Out! fire extinguishers.

26. At the time of the issuance of the newsletter, Defendant Zoch ignored the "nationally recognized testing labs" when declaring the Fires Out! extinguishers illegal.

27. The policy of the State Fire Marshal Office when assessing portable fire extinguishers was to ignore the "nationally recognized testing labs" standard and only to approve extinguishers bearing seals of State Board of Insurance approved labs.

28. Defendants Emerson, DiDonato, Wood, and Zoch participated in the creation and dissemination of Plaintiff's Exhibit 6, the newsletter.

29. The newsletter declared the Fires Out! extinguishers illegal.

30. The newsletter initiated the chain of events that led to Mr. Borland's arrest.

31. Any objectively reasonable person would know that the newsletter probably would result in the arrest of Mr. Borland.

32. The issuance of the newsletter was a proximate cause of Mr. Borland's arrest.

33. No hearing as required by the Texas Administrative Procedure Act, § 13A, was ever held by the State Fire Marshal Office

with regard to the Fires Out! extinguishers' legality, or whether General Labs was a "nationally recognized testing lab."

34. The Fires Out! extinguisher bore a certification seal from General Labs of Hutchinson, Kansas.

35. The Fires Out! extinguisher was a portable fire extinguisher.

36. Mr. Borland was engaged in the retailing and wholesaling of portable fire extinguishers, and was not engaged in the installation or recharging of them.

37. Any finding of fact which is more properly a conclusion of law shall be so construed.

38. Any conclusion of law which is more properly a finding of fact shall be so construed.

SIGNED this the 15th day of November, 1994.

/s/John K. Dietz
JOHN K. DIETZ, JUDGE PRESIDING

APPENDIX E

FILED
NOV 15 1994 4:57 PM
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CONCLUSIONS OF LAW
Signed and Filed November 15, 1994

NO. 435,470

H. SCOTT BORLAND	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
ERNEST EMERSON,	§	
QUAY WOOD, BRIAN	§	
McRAE, GLENN ZOCH	§	
AND LEWIS diDONATO	§	53RD JUDICIAL DISTRICT

CONCLUSIONS OF LAW

1. Venue is proper in Travis County, Texas and this Court has jurisdiction over this action.

2, The Columbus warrant was invalid.

3. The Fires Out! extinguisher was exempt from § 5.43-1 of the Insurance Code pursuant to § 6 (d).

4. Section 5.43-1 of the Insurance Code dictates that venue for a violation of that law is in Travis County.

5. The Fourth Amendment is clearly established law.

6. Mr. Borland was wrongfully arrested and detained.

7. There was no probable cause to arrest Mr. Borland.

8. Mr. Borland's Fourth Amendment Rights were violated.

9. Section 5.43-1 of the Insurance Code is unconstitutionally vague via its use of the "nationally recognized testing lab standard."

10. Before this Fires Out! extinguisher could be declared illegal, the State Fire Marshal Office was required to hold a hearing pursuant to the Administrative Procedure Act § 13A.

11. The Defendants are not entitled to federal qualified immunity.

12. The Defendants' conduct was not objectively reasonable in light of law that was clearly established at the time.

13. Defendants' conduct was such that no rational official would think it reasonable.

14. Any findings of fact which are more properly designated conclusions of law shall be so designated, and any conclusions of law which are more properly designated findings of fact shall be so designated.

SIGNED this the 15 day of November, 1994.

/s/John K. Dietz
JOHN K. DIETZ, JUDGE PRESIDING

APPENDIX F

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS
AT AUSTIN

JUDGMENT RENDERED JULY 17, 1996

NO. 03-95-00023-CV

ERNEST A. EMERSON, QUAY WOOD, BRIAN McRAE,
GLENN ZOCH AND LOUIS diDONATO V. H. SCOTT BORLAND
APPEAL FROM 53RD DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE CARROLL,
JUSTICES JONES AND B.A. SMITH
REVERSED AND RENDERED — OPINION BY JUSTICE JONES

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court is reversed, and judgment is rendered that appellee take nothing. It is FURTHER ordered that the appellee pay all costs relating to this appeal both in this Court and the court below; and that this decision be certified below for observance.

**TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN**

NO. 03-95-00023-CV

**Ernest A. Emerson, Quay Wood, Brian McRae,
Glenn Zoch, and Louis diDonato, Appellants**

v.

H. Scott Borland, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,
53RD JUDICIAL DISTRICT NO. 435,470,
HONORABLE JOHN K. DIETZ, JUDGE PRESIDING**

Appellee H. Scott Borland sued appellants Ernest A. Emerson, Quay Wood, Brian McRae, Glenn Zoch, and Louis diDonato for damages arising out of his arrest and imprisonment for five days following appellants' determination that the portable fire extinguishers he was selling were illegal for sale in Texas. At trial, Borland prevailed on claims pursuant to 42 U.S.C. § 1983 for violation of his Fourth and Fourteenth Amendment rights and on a state common-law tort claim for false imprisonment. Based on the jury's findings, the trial court rendered judgment that Borland recover from appellants $100,000 in damages, plus interest and attorney's fees. On appeal, appellants assert that there is no evidence they violated Borland's Fourth and Fourteenth Amendment rights or caused him to be falsely imprisoned. Alternatively, appellants contend that, as a matter of law, they were immune from suit on the basis of qualified and official immunity. We will reverse the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Circumstances Leading to Borland's Arrest

Prior to his arrest in 1986, Borland was a traveling sales representative engaged in the business of selling "Fires Out" brand portable aerosol fire extinguishers in Texas since 1980. The extinguishers are manufactured by Fires Out, Inc. of Hutchinson, Kansas. The label on the extinguishers indicates that they have been tested and approved by "General Laboratories" in Hutchinson, Kansas.

The sale of portable fire extinguishers is regulated by article 5.43-1 of the Insurance Code. At the time of Borland's arrest, article 5.43-1 provided:

> **Purpose**
>
> Section 1. The purpose of this article is to regulate the leasing, renting, selling, and servicing of portable fire extinguishers . . . in the interest of safeguarding lives and property.
>
> . . .
>
> **Definitions**
>
> Sec. 3 . . . (c) "Portable fire extinguisher" means any device that contains within it chemical fluids, powder, or gases for extinguishing fires *and has a label of approval attached by a nationally recognized testing laboratory, such as, but not limited to, the Underwriters Laboratories Inc. and Factory Mutual Research Corporation.*
>
> . . .

Selling or leasing of portable fire extinguishers . . .

Sec. 5. (a) No portable fire extinguisher . . . may be leased, sold, rented or installed in this state unless it carries *a label of approval of a nationally recognized testing laboratory or a testing laboratory approved by the State Board of Insurance.*

. . .

Exceptions

Sec. 6. The provisions of this article do not apply to the following:

. . .

(d) firms engaged in the retailing or wholesaling of portable fire extinguishers *as defined in Section 3,* but not engaged in the installation or recharging of them;

. . .

Certain acts prohibited

Sec. 10. No person may do any of the following:

. . .

(9) sell, rent, or lease a portable fire extinguisher that has not been approved as provided by Subsection (a) of Section 5 of this article.

. . .

Penalties

> Sec. 12. . . . (b) A person commits an offense if the person knowingly or intentionally violates Section 10 of this article.
>
> (c) An offense under Subsection (b) of this section is a Class B misdemeanor. Venue for the offense is in Travis County.

See Act of May 7, 1981, 67th Leg., R.S., ch. 175, § 1, 1981 Tex. Gen. Laws 416, 416-21, *amended by* Act of May 27, 1983, 68th Leg., R.S., ch. 245, §§ 1,2,3, 1983 Tex. Gen. Laws 1091, 1091-93 (Tex. Ins. Code Ann. art. 5.43-1, since amended) (emphasis added).

The state fire marshal's office is charged with enforcing article 5.43-1. Act of May 28, 1975, 64th Leg., R.S., ch. 326, § 2, 1975 Tex. Gen. Laws 853, 857 (Tex. Ins. Code Ann. art. 1.09A, since repealed and codified at Tex. Gov't Code Ann. § 417.004(a) (West 1990). At the time of the events in question, Emerson was the State Fire Marshal, Zoch was director of licensing for the fire marshal's office, Wood was supervisor of enforcement, diDonato was general counsel, and McRae was an investigator.

During 1980 or 1981, the state fire marshal's office determined that the Fires Out portable fire extinguisher did not comply with article 5.43-1 and therefore could not be sold legally in Texas. To be legal for sale under the statute, a portable fire extinguisher had to carry a label of approval from either a "nationally recognized testing laboratory" or a laboratory approved by the State Board of Insurance. General Laboratories, the laboratory that approved the Fires Out extinguisher, had not been approved by the State Board of Insurance,[1] and

---

1. At the time of events in question, the State Board of Insurance had given approval only to Underwriter's Laboratory, Factory Mutual Research Corporation, and the United States Testing Company. *See* Tex. Admin. Code § 27.7 (West 1984).

the staff of the fire marshal's office concluded, based on their collective experience in the fire suppression industry, that General Laboratories was not a nationally recognized testing laboratory.[2] The only laboratories that the fire marshal's office considered nationally recognized were the two laboratories listed in the statute: Underwriters Laboratories Inc. ("UL") and Factory Mutual Research Corporation ("FM").

In 1981 and 1982, the state fire marshal's office sent Fires Out, Inc. and Borland letters informing them that the sale of the Fires Out portable fire extinguisher was not legal in Texas and should be discontinued. The letters stated that only portable fire extinguishers with a label from either UL or FM were legal for sale in Texas. Both letters invited the recipients to contact the fire marshal's office if there were any questions. Borland ignored the letters, believing that Fires Out came within the statute because the statute did not require a label *only* from UL or FM, and also believing that General Laboratories was nationally recognized. Borland never responded to the letters and continued to sell the Fires Out extinguishers. In 1983, the state fire marshal's office sent Borland a certified letter advising him that the sale of Fires Out extinguishers was illegal, citing article 5.43-1, and requesting that he contact the office. That letter was returned unclaimed.

In June 1985, McRae received a complaint from Beaumont about Fires Out portable fire extinguishers. McRae had never heard of General Laboratories or Halon 113, the extinguishing agent listed on Fires Out extinguishers. As a result, McRae contacted Elvin Lane at Fires Out, Inc. to inquire about the tests General Laboratories had used in approving the extinguisher and to find out the extinguisher's chemical composition. Lane stated that General Laboratories had tested the extinguishers to UL standards 608A and B. Lane recommended, however, that McRae contact General Laboratories directly. McRae later learned that UL standards 608A and B do not exist, and that standard 608 is a testing standard for burglary vault doors.

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2. Despite their many years of collective experience in the fire suppression industry, appellants had neither heard of General Laboratories nor encountered any fire marshal who had.

Taking Lane's advice, McRae contacted Dr. Ronald Wells, head of General Laboratories. Wells told McRae that the Fires Out portable fire extinguisher had not passed a UL test. Instead, Wells tested the Fires Out extinguisher with a test he had written because he did not believe the Fires Out extinguisher would pass a UL test. McRae then contacted Gabriel Hackman at Dupont, the manufacturer of Halon 113. Hackman told McRae that Dupont referred to the chemical as Freon 11 (trichlorofluromethane) and recommended its use as a commercial refrigerant, not a fire extinguishing component.

In early 1986, Emerson and diDonato made a recommendation to the State Board of Insurance that article 5.43-1 be amended to delete the reference to "nationally recognized testing laboratory" They proposed this change because they believed the standard was difficult for laboratories and the fire marshal's office to prove.

At approximately the same time that Emerson and diDonato were suggesting changes to the statute, Emerson, Wood, and Zoch, with assistance from diDonato, composed and distributed a newsletter to local fire officials throughout Texas. The newsletter identified Fires Out portable fire extinguishers, among others, as illegal for sale in the state. The purpose of the newsletter was to collect information about where portable fire extinguishers that were considered illegal under article 5.43-1 were being sold in the state. The newsletter mentioned several brands of extinguishers, including Fires Out. The newsletter did not, however, mention Borland and did not indicate that any action should be taken against individuals selling the listed extinguishers, but only asked local officials to contact Wood at the state fire marshal's office if they found any such products in their community.

Several local fire and law enforcement officials responded to the newsletter. Callers requesting information about the extinguishers identified in the newsletter were told that the state fire marshal's office had determined that they were illegal for sale and were referred to article 5.43-1 of the Insurance Code. Most calls concerning Borland and/or the sale of Fires Out extinguishers were referred to McRae.

Shortly after the newsletter was distributed, Wood received a phone call from Groveton, in Trinity County, asking what statute Borland was violating and if the state fire marshal had any reason to want Borland detained or arrested. Wood responded in the negative, directed the caller to the appropriate sections of the Insurance Code, and advised the caller to contact the Travis County District Attorney. Later someone from Groveton called and informed Wood that Borland had been arrested there for violations of article 5.43-1.

At the time the newsletter was distributed, the staff of the state fire marshal's office had made no attempt to have Borland arrested because they had no personal knowledge that he was selling Fires Out extinguishers in Texas. Until that point, their knowledge of Borland, his activities, and the sale of Fires Out portable fire extinguishers was based on reports from local fire officials. Additionally, the Fires Out case was only one of more than 400 cases the fire marshal's office was handling and did not have a high priority.

Thomas Wine, Chief of Police for Columbus, Texas, received a copy of the newsletter from local fire marshal Lee Hammons and city fire chief Bobby Waller when they reported that Borland had been selling Fires Out extinguishers in the Columbus area. Wine contacted the state fire marshal's office to find out what to do about Borland. He was referred to McRae. McRae told Wine that Fires Out portable fire extinguishers were illegal for sale in Texas pursuant to article 5.43-1. Wine testified that McRae initially advised him to get a warrant for Borland's arrest and a few days later told him the warrant could be served when Borland would be in Groveton, Texas, on or about January 31st to retrieve a briefcase he had left at the bank. McRae, however, testified that he told Wine where Borland was going to be but never told Wine to get a warrant for Borland's arrest.

After his conversations with McRae, Wine swore out a complaint against Borland for violating section 10 of article 5.43-1. The complaint was presented to a justice of the peace of Colorado County, and warrant #1680 was issued from Columbus for Borland's arrest on January 31, 1986. Wine stated that he then contacted the Groveton

police chief to inform him about the Columbus warrant. That afternoon Groveton officials arrested Borland and notified Wine that they had Borland in custody. Wine requested that a "hold" be placed on Borland for the Columbus warrant and sent a teletype confirmation of the hold.[3] Wine testified that McRae later called back and requested that Wine cancel the warrant because a warrant would be issued from Travis County. Wine withdrew the complaint and the Columbus warrant was never served.

Meanwhile, also on January 31, 1986, an arrest warrant for Borland was issued out of Eagle Lake, Texas, for violations of article 5.43-1. After Borland's arrest, Eagle Lake Police Chief Ben Johnson requested that a hold be placed on Borland; however, the Eagle Lake warrant was also withdrawn before it was served. There is no evidence in the record to indicate who brought the complaint in Eagle Lake or whether there was any contact between anyone at the state fire marshal's office and the Eagle Lake Police Department. Wine testified that he was the person who requested that the Eagle Lake warrant be cancelled.

Sergeant Frank Braggs of the Trinity County Sheriff's Department testified that he was not aware of either warrant before encountering Borland in Groveton. Braggs learned about Borland after several Groveton citizens and businesses, who became suspicious about whether Borland was legitimate because he was selling fire extinguishers door to door, contacted the Groveton Police Department. The Groveton Police Department in turn contacted the Trinity County Sheriff's Department to investigate the complaints.

Sergeant Braggs and Officer McClelland of the Groveton Police Department located Borland at the Groveton bank. While

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3. Wine stated that a "hold" notifies another law enforcement agency that the notifying agency has a warrant on a person that the other agency already has in custody. The hold requests the other agency to contact the notifying agency before the person in custody is released so that the notifying agency may then come and serve their warrant.

McClelland spoke to Borland, Braggs ran a computer search and discovered that there were warrants for Borland's arrest out of Eagle Lake and Columbus for violations of article 5.43-1. Braggs arrested Borland on the basis of these outstanding warrants. Braggs stated that he never had any contact with anyone from the state fire marshal's office.

Also on January 31, 1986, a Groveton policeman and a Groveton fire official approached Trinity County Attorney Joe Warner Bell and said they had a complaint against Borland for selling illegal fire extinguishers. Bell told the officers that he needed someone with personal knowledge of Borland's actions to swear out a complaint before he could take any action. Groveton resident Benny McClain, owner of a local hardware store, called Bell shortly thereafter and stated that he would be willing to swear out a complaint against Borland. Bell did not know how McClain knew the Fire's Out portable fire extinguisher violated article 5.43-1. Based on McClain's complaint, Bell presented an information to Trinity County Judge Jimmy Thornton charging Borland with a class B misdemeanor under article 5.43-1. At the time the information was presented, Bell was not aware of the outstanding warrants from Eagle Lake and Columbus.

Bell testified that, by custom in Trinity County, instead of a warrant being issued immediately for Borland's arrest, the information normally would have resulted in a summons being issued to Borland to voluntarily appear before the judge to discuss the charges. If Borland failed to respond, then a warrant would have been issued for his arrest. Because Borland was already in custody, however, no summons or warrant was necessary.

The Arrest

On January 31, 1986, Borland was arrested in Groveton by Sergeant Braggs and Officer McClelland on the basis of the outstanding warrants out of Eagle Lake and Columbus for selling portable fire extinguishers in violation of article 5.43-1 of the Insurance Code. After his arrest, Borland was brought before the justice of the peace and read his rights with regard to both charges. Borland was later taken

before the county judge and charged in Trinity County with another violation of article 5.43-1. After receiving these warning, Borland was held in the custody of the Groveton Police Department for five days. He was released and all charges against him were dropped on February 4, 1986 after he agreed to pay restitution to individuals who had purchased a Fires Out extinguisher from him.

The Lawsuit After the Arrest

After his release, Borland filed suit against appellants[4] alleging that their actions caused him to be arrested without probable cause, thereby violating his Fourth Amendment right to be free from unreasonable seizures[5] and depriving him of his Fourteenth Amendment right to due process. Borland contended that, by distributing the newsletter, Emerson, Wood, Zoch, and diDonato caused his arrest by spreading misinformation to local fire officials that the sale of Fires Out extinguishers was illegal for sale in Texas. Additionally, Borland contended that McRae not only spread misinformation that Borland violated the statute, but also ordered his actual arrest. Borland's claims rested on his assertions that either (1) his actions were legal under article 5.43-1 and the state fire marshal's office misinterpreted the statute or (2) the state fire marshal's office knew that article 5.43-1 was vague in failing to give sufficient notice of what constituted a "nationally recognized testing laboratory" and therefore acted in bad faith in continuing to

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4. In addition to the appellants herein, Borland originally sued Doyce R. Lee, individually and as the Commissioner of the State Board of Insurance, Edwin J. Smith, Jr., individually and as the Chairman of the Board of the State Board of Insurance, David H. Thornberry, individually and as a Member of the State Board of Insurance, and James L. Nelson, individually and as a Member of the State Board of Insurance. Borland eventually nonsuited those defendants.

5. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

enforce the statute when they had no probable cause to believe the sale of Fires Out extinguishers violated article 5.43-1.[6]

In addition to his federal claim, Borland alleged a state-law claim for false imprisonment. Borland contended that the arrest was unlawful because (1) the warrants were issued without probable cause, and (2) article 5.43-1 places venue for prosecution in Travis County and both warrants leading to Borland's arrest were issued out of Colorado County. Borland did not sue the police officers who sought the arrest warrants, the police officers who arrested him, the cities in which he was arrested, or the judges who signed the warrants.

Appellants denied the allegations and asserted affirmative defenses of qualified and official immunity. The trial court denied appellants' motion for summary judgment, based in part on qualified and official immunity, and the case proceeded to trial before a jury.[7] The parties stipulated that appellants were acting under color of state law and in the course and scope of their employment

At the close of all the evidence, appellants requested a directed verdict on the basis that (1) Borland had failed to prove that any defendant violated Borland's Fourth and Fourteenth Amendment rights and failed to prove that any defendant had falsely imprisoned him; (2) defendants were entitled to qualified immunity because Borland failed to prove by a preponderance of the evidence that no objectively reasonable officer would have concluded that a warrant should have been issued for Borland's arrest; and (3) defendants were entitled to official immunity because Borland failed to prove that any defendant acted in

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6. Neither the correct interpretation of the statute nor its constitutionality were issues properly before the district court and accordingly are not present for our review.

7. After their motion for summary judgment was denied, appellants attempted to appeal to this Court pursuant to Texas Civil Practice and Remedies Code section 51.014(5). Because the suit was originally brought before the effective date of section 51.014(5), however, the appeal was dismissed for want of jurisdiction. *Emerson v. Borland*, 838 S.W.2d 951, 952 (Tex. App.—Austin 1992, no writ).

bad faith. The trial court denied the motion for directed verdict and submitted the charge to the jury.

In its charge, the court submitted four questions to the jury:[8]

QUESTION NO. 1:

Did any of the Defendants proximately cause the deprivation of Scott Borland's Constitutional rights under the Fourth Amendment to the U.S. Constitution?

[The jury answered "yes" for each defendant.]

QUESTION NO. 2:

Do you find from a preponderance of the evidence that any of the individual Defendants is entitled to the defense of official, or quasi-judicial, immunity?

Ernest Emerson	**Yes**
Quay Wood	**Yes**
Brian McRae	**No**
Glenn Zoch	**Yes**
Lewis diDonato	**Yes**

QUESTION NO. 3:

Did any of the Defendants proximately cause the false imprisonment of Scott Borland?

[The jury answered "yes" for each defendant.]

In answer to question four, the jury found $100,000 in past damages and no future damages.

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8. The court's instructions and definitions have been omitted.

Appellants filed motions to disregard the verdict and for judgment notwithstanding the verdict. The court denied the motions and rendered judgment for Borland on the jury's verdict, awarding Borland $100,000 in actual damages, $43,570.50 in attorneys' fees, and $87,297.63 in prejudgment interest. Based on the jury's answers to questions one and three, the court held all defendants jointly and severally liable on the judgment. The trial court concluded that no defendant was entitled to the defense of qualified immunity. Appellants' motions to modify the judgment and for new trial were overruled by operation of law. This appeal ensued.

DISCUSSION

In points of error one and two, appellants assert that there is no evidence they caused a deprivation of Borland's Fourth and Fourteenth Amendment rights or caused Borland to be falsely imprisoned. In points of error three and four, appellants assert that, as a matter of law, they were entitled to qualified and official immunity.

In deciding a no-evidence point, we must consider only the evidence and inferences tending to support the finding of the trier of fact and disregard all evidence and inferences to the contrary. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670 671 (Tex. 1990). We will uphold the finding if more than a scintilla of evidence supports it. *Crye*, 907 S.W.2d at 499; *Seideneck v. Cal Bayreuth Assocs.*, 451 S.W.2d 752, 755 (Tex. 1970); *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). The evidence supporting a finding amounts to more than a scintilla if reasonable minds could differ in their conclusions. *Crye*, 907 S.W.2d at 499; *Transportation Ins. Co. v Moriel*, 879 S.W.2d 10, 25 (Tex. 1994). *See generally* William Powers, Jr. & Jack Ratliff, *Another Look at No Evidence: and "Insufficient Evidence,"* 69 Tx. L. Rev. 515 (1991); Michol O'Conner, *Appealing Jury Findings*, 12 Hous. L. Rev. 65 (1974). Evidence equally susceptible of two opposite inferences, however, is no more than a scintilla of evidence and cannot support a judgment. *Tubelite v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991); *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984).

In deciding a legal-sufficiency point of error that attempts to overcome an adverse fact finding as a matter of law, we must first consider only the evidence and inferences tending to support the finding, disregarding all evidence and inferences to the contrary; if there is no evidence to support the finding, we must then examine the entire record to see if the contrary proposition is established as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); *see also Texas & N.O.R.R. v. Burden*, 203 S.W.2d 522 528-31 (Tex. 1947). *See generally* Powers & Ratliff, *supra*, 69 Tex. L. Rev. at 523.

Borland's Federal Claim

(i) Deprivation of Constitutional Rights. Borland's federal claim of violation of his Fourth and Fourteenth Amendment rights was brought pursuant to 42 U.S.C. § 1983. Section 1983 provides a remedy when any person acting under color of state law deprives another of rights protected by the Constitution.[9] In analyzing the propriety of a section 1983 claim, the court must first determine whether the plaintiff has been deprived of a right secured by the Constitution. *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *see Pyles v. Raisor*, 60 F.3d 1211, 1213 (6th Cir. 1995) (holding that arrestee could not recover under section 1983 for arrest that violated Kentucky law but comported with minimum requirements of Fourth Amendment). The plaintiff bears the burden of proving a constitutional violation by a preponderance of the evidence. *See Crowder v. Sinyard*, 884 F.2d 804, 824 (5th Cir. 1989).

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9. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C.A. § 1983 (West 1994).

If the court finds that the plaintiff has suffered a violation of his constitutional rights, the second inquiry is whether the defendants are responsible for that violation. *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Only after the court has found that the defendants have caused a violation of the plaintiff's constitutional rights should the court consider whether the defendants are entitled to the defense of qualified immunity. *See Seigert v. Gilley*, 500 U.S. 226, 232 (1991).

The Fourth Amendment requires that no arrest warrant should issue absent a showing of probable cause. U.S. Const. amend. IV. Probable cause is a fluid concept that turns on the assessment of probabilities in particular factual contexts resistant to being reduced to a set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The determination is derived from assessing the totality of the circumstances to assess whether the facts alleged in the affidavit underlying the warrant show a fair probability that an individual has committed an offense. *See id.* at 238. In assessing whether probable cause existed to justify the issuance of an arrest warrant, a reviewing court is limited to an examination of the four corners of the supporting complaint or affidavit. *Gibbs v. State*, 819 S.W.2d 821, 830 (Tex. Crim. App. 1991).

In the present case, Borland's arrest was based on arrest warrants from Columbus and Eagle Lake. Borland does not challenge the facial validity of the warrants. Nor does he complain that the complaints (*i.e.*, affidavits) on which the warrants were based contained false statements. He contends instead that the complaints, and hence the warrants, were invalid because they were based on a misinterpretation of article 5.43-1 by appellants. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 171 (1978).[10]

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10. The arresting officer testified without contradiction that Borland was arrested as a result of *both* the Columbus and Eagle Lake warrants. Although the Columbus warrant and complaint are in the record, neither of those documents from Eagle Lake is. Nor is there evidence of any connection between the Eagle Lake complaint or warrant and any of the appellants. Since Borland's claims stand or fall on the invalidity of the warrants by which he was arrested and on a causal link between

A mere misinterpretation of a statute, however, is not enough to form the basis of a section 1983 action. To be actionable under section 1983, the act of a state official must constitute an "affirmative abuse of power"; mere negligence or lack of due care does not work a deprivation "in the constitutional sense" and hence will not support a section 1983 action. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

In an attempt to satisfy this requirement, Borland argues that appellants' interpretation of article 5.43-1 was not merely wrong, it was so grossly wrong as to constitute evidence of bad faith or reckless conduct. This contention is based on two related arguments: (1) appellants did not understand the law they accused Borland of violating, because they did not know what "nationally recognized testing laboratory" meant; and (2) appellants had no criteria for determining what a nationally recognized testing laboratory was.

First, we believe that an enforcement officer's lack of complete understanding of a criminal statute is no evidence that an attempt to enforce the statute was reckless or in bad faith. With all due respect to the legislature, it is not uncommon for statutes, including criminal statutes, to contain phrases and terms that are less than crystal clear. Yet the officers who are charged with the enforcement thereof are not relieved from their duty by such imperfections. Until further guidance is given by the legislature or the courts, such officials must fashion a reasonable interpretation and carry on as best they can.

Second, we conclude that under the circumstances of the present case, appellants' lack of formal criteria for identifying a "nationally recognized testing laboratory" does not give rise to an inference of bad faith or reckless conduct. Although the term "nationally recognized

---

appellants and his arrest, this deficiency alone probably renders the evidence legally insufficient to support the elements of his section 1983 and false imprisonment claims. Nonetheless, because we reach the same results on other grounds, we will assume for the sake of argument that the form, content, and genesis of the Eagle Lake complaint and warrant were the same as that of the Columbus documents.

testing laboratory" was not defined in the statute, the legislature gave two examples of laboratories that did meet that standard. The evidence is undisputed that appellants used those examples to construct their own informal criteria: laboratories equivalent to or on the same order of national recognition as UL and FM. Moreover, in our opinion the fact that appellants did not initiate a formal investigation into General Laboratories before deciding that it did not meet the test of "nationally recognized testing laboratory" is no evidence of bad faith or recklessness. Appellants are experts in the fire suppression field with many years experience, yet none of them had ever heard of General Laboratories. Although they might differ in minor respects about what constituted a nationally recognized testing laboratory, they agreed on one thing: General Laboratories was not one.

We conclude that the evidence in this record would support, *at most*, a finding that appellants were negligent in the manner in which they decided that General Laboratories was not a nationally recognized testing laboratory and, hence, that Borland was violating state law in selling Fires Out portable fire extinguishers. As discussed above, however, negligence is not sufficient to support a section 1983 action *Daniels*, 474 U.S. at 330-31. Point of error one is sustained.

(ii) Qualified immunity. Even if Borland has established that his constitutional rights were violated and that appellants were responsible for those violations, we would still conclude that appellants are entitled to qualified immunity. Under federal law, "government officials performing discretionary functions generally are shielded from liability for civil damages if their conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). To preclude immunity from suit, the clearly established right must be the federal right on which the claim for relief is based and must be established at the time of the violation. *Elder v. Holloway*, 127 L. Ed. 2d 344, 350,351 (1994). The test of what is a "clearly established law" must bear a relationship to the "objective legal reasonableness" that is the touchstone of *Harlow, Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

If the contours of the right are not so clear that a reasonable official would understand that what he is doing violates that right, then qualified immunity will be found. *Anderson*, 483 U.S. at 640. While the alleged wrong need not have been previously held unlawful, to subject an official to liability the unlawfulness must be apparent in light of pre-existing law. *Id.; Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988). As a result, qualified immunity is a powerful shield that will protect "all but the plainly incompetent or those who *knowingly* violate the law." *Swint v. City of Wadley*, 5 F.3d 1435, 1442 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1313 (1995) (emphasis added).

The Fourth Amendment's guarantee that warrants should not issue without probable cause is a clearly established right. *Habinger v. City of Fargo*, 1996 WL 154408 *5 (8th Cir. 1996). Our analysis must focus, however, on whether a reasonable official in appellants' circumstances would have know that appellants' actions violated that clearly established right. The record reflects that Emerson, Wood, Zoch, and diDonato's only involvement in the chain of events leading to Borland's arrest was their communication to local law enforcement officials in a newsletter that Fires Out did not carry a label of approval from a "nationally recognized testing laboratory" under article 5.43-1 and therefore was considered illegal for sale in Texas. In addition to conveying this conclusion to local law enforcement officials, there is some evidence that, based on the interpretation of the statute made by his superiors, McRae instructed Wine to arrest Borland. While there is no evidence linking any action of appellants with the arrest warrant issued out of Eagle Lake, we will once again, for purposes of this discussion, assume that appellants' newsletter was the impetus for the issuance of that warrant.

The interpretation of a statute by an official charged with is enforcement is a discretionary function:

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law foreclosed speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and fla-

> grantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Michigan v. DeFillippo, 443 U.S. 31, 38 (1979).

Article 5.43-1 has not been declared unconstitutional and that issue is not currently before us. As noted above, however, although the statute does not define "nationally recognized testing laboratory," it provides two examples for what is considered nationally recognized. Thus, the statute provides guidelines for interpretation that prevent us from concluding that it is unconstitutionally vague. We conclude that article 5.43-1 is not so facially infirm, nor appellants' interpretation so obviously wrong, that a reasonable official in appellants' circumstances would believe that an attempt to enforce it was without lawful authority.

With regard to their interpretation of the statute, appellants' uncontradicted testimony reflects that based on their experience in the fire suppression industry, they believed that General Laboratories was not the same quality laboratory as UL and FM and was not nationally recognized. As discussed above, even if appellants' interpretation of the statute was wrong, a good faith misinterpretation of a statute is at best negligence, and negligence is not actionable under section 1983. *See Daniels*, 474 U.S. at 330. There is no evidence that appellants knew that the interpretation that they communicated was wrong or that they communicated it recklessly without regard to its correctness. We believe that under these facts, no reasonable official would believe that the mere communication to independent law enforcement officials of good faith interpretation of a statute or the instruction to arrest an individual who is violating the statute based on that interpretation would be a violation of Fourth or Fourteenth Amendment rights. Appellants were, therefore, entitled to be protected from liability by the qualified-immunity defense. We sustain point of error three.

Borland's State-Law Claim

(i) False imprisonment. Borland's state-law claim alleged that appellants caused him to be falsely imprisoned. The elements of a false imprisonment claim are (1) a willful detention, (2) without consent, and (3) without authority of law. *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985); *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982); *see also McElroy v. United States*, 861 F. Supp. 585, 595 (W.D. Tex 1994). Appellants argue that Borland's claim for false imprisonment fails because he was arrested pursuant to a lawful arrest. Having already concluded that Borland's arrest caused no federal constitutional violation, we must now determine whether the arrest was unlawful under state law. *See Ker v. California*, 374 U.S. 23, 37 (1963); *Amores v. State*, 816 S.W.2d 407, 413 (Tex. Crim. App. 1991) (holding that legality of state arrest is determined by state law, so long as that law is not violative of Federal Constitution).

It is settled law in Texas that "[i]f an arrest of detention is executed under process which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie." *James*, 637 S.W.2d at 918. In the present case, the arrest was based on perceived violations of Insurance Code article 5.43-1 and executed pursuant to warrants issued out of Columbus and Eagle Lake. Borland contends that his arrest was unlawful for two reasons: (1) no probable cause existed to issue the warrants; and (2) the warrants were not issued from Travis County, where article 5.43-1 places venue, and therefore were not issued by courts of competent jurisdiction.

We reject the first argument because Borland's challenge is not to the legal sufficiency of the *form* of the process by which the arrest warrants were issued. Moreover, it appears that the rule of *James v. Brown* prohibits a court from looking behind the form of the process by which an arrest is made. If the form of the process is legally sufficient, that aspect of the inquiry ends. Finally, as discussed above, there is no evidence that appellants acted in bad faith or recklessly in disseminating their interpretation of article 5.43-1.

We also reject Borland's contention that, because article 5.43-1 places venue in Travis County, only a court in Travis County has authority to issue an arrest warrant for a violation of that statute. We believe Borland fails to make a proper distinction between jurisdiction and venue. Jurisdiction is the power of a court to hear and determine a cause. *Ex Parte Watson*, 601 S.W.2d 350, 351 (Tex. Crim. App. 1980). Venue, on the other hand, merely refers to the place where a case may be tried. *Boyles v. State*, 820 S.W.2d 122, 139-40 (Tex. Crim. App. 1989), *cert denied*, 503 U.S. 921 (1992); *Etchieson v. State*, 574 S.W.2d 753 (Tex. Crim. App. 1978), *cert. denied*, 440 U.S. 936 (1979).

Courts have jurisdiction to issue warrants with statewide authority regardless of where venue lies. Article 15.03 of the Code of Criminal Procedure provides:

> (a) A magistrate may issue a warrant of arrest or a summons:
>
> 1. In any case in which he is by law authorized to order verbally the arrest of an offender;
>
> 2. When any person shall make oath before the magistrate that another has committed some offense against the laws of the State; and
>
> 3. In any case named in this Code where he is specially authorized to issue warrants of arrest.

Tex. Code Crim. Proc. Ann. art. 15.03 (West 1977). The designation of venue in article 5.43-1 restricts where Borland could be tried for the charged offense. The venue provision does not, however, restrict a court's power to issue an arrest warrant prior to the commencement of prosecution. Accordingly, we conclude the Columbus and Eagle Lake arrest warrants were issued by courts of competent jurisdiction. For purposes of his false imprisonment claim, therefore, Borland's arrest and detention were, as a matter of law, not unlawful under state law. We sustain point of error two.

(ii) Official Immunity. Even if Borland had succeeded in proving that his arrest was unlawful under state law, we would still conclude that McRae was entitled to the defense of official immunity.[11] Under Texas law, governmental employees are entitled to official immunity from suit arising from performance of their discretionary duties in good faith as long as they are acting within the scope of their authority. *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994). On appeal, Borland contends that the only issue is whether McRae was acting in good faith. The test for good faith is one of objective legal reasonableness, without regard to whether the official acted with subjective good faith. *Id.* at 656.

Based on our foregoing discussion of Borland's federal claim, we conclude that as a matter of law it was objectively reasonable for McRae to have believed that (1) his superiors' interpretation of article 5.43-1 was correct; and (2) a warrant could have been validly issued from Colorado County for a violation of article 5.43-1. Accordingly, we hold that the evidence demonstrates conclusively that McRae is protected by the official immunity defense. We sustain point of error four.

CONCLUSION

In light of the foregoing disposition, we need not address appellants' remaining points of error. We reverse the judgment of the trial court and render judgment that Borland take nothing.

J. Woodfin Jones, Justice

Before Chief Justice Carroll, Justices Jones and B. A. Smith

Reversed and Rendered

Filed: July 17, 1996

Publish

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11. As indicated above, the jury found that all defendants except McRae were entitled to official immunity with respect to Borland's false imprisonment claim. It does not appear that the trial court disregarded those findings, nor does Borland challenge them here. Accordingly, we will address the official immunity defense only as it relates to McRae.

APPENDIX G

Correction to Opinion of the Third Court of Appeals

COURT OF APPEALS
FOR THE
THIRD DISTRICT OF TEXAS
P.O. Box 12547, AUSTIN, TEXAS 78711-2547
(512) 463-1733

DIANE O'NEAL, CLERK

Date:	**September 18, 1996**
Case Number:	**03-95-00023-CV**
Trail Court No.:	**433,470**
Style:	**Ernest A. Emerson, Quay Wood, Brian McRae, Glenn Zoch and Louis diDonato v. H. Scott Borland**

You are hereby notified that appellee's motion for rehearing was submitted and overruled by this Court on the date noted above. A correction has been made on page seventeen (17), n.10 of the opinion issued by this Court July 17, 1996, and was sent this date to the following persons:

ANT The Honorable Dan Morales, Attorney General

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JDG 005857150
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to a set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The determination is derived from assessing the totality of the circumstances to assess whether the facts alleged in the affidavit underlying the warrant show a fair probability that an individual has committed an offense. *See id.* at 238. In assessing whether probable cause existed to justify the issuance of an arrest warrant, a reviewing court is limited to an examination of the four corners of the supporting complaint or affidavit. *Gibbs v. State*, 819 S.W.2d 821, 830 (Tex. Crim. App. 1991).

In the present case, Borland's arrest was based on arrest warrants from Columbus and Eagle Lake. Borland does not challenge the facial validity of the warrants. Nor does he complain that the complaints (*i.e.*, affidavits) on which the warrants were based contained false statements. He contends instead that the complaints, and hence the warrants, were invalid because they were based on a misinterpretation of article 5.43-1 by appellants. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 171 (1978).[10]

A mere misinterpretation of a statute, however, is not enough to form the basis of a section 1983 action. To be actionable under section 1983, the act of a state official must constitute an "affirmative abuse of power"; mere negligence or lack of due care does not worl

10. Borland was apparently arrested as a result of *both* the Columbus and Eagle Lake warrants. Although the Columbus warrant and complaint aren the record, neither of those documents from Eagle Lake is. Nor is there evidence o any connection between the Eagle Lake complaint or warrant and any of the appellants. Since Borland's claims stand or fall on the invalidity of the warrants by which he was arrested and on a causal link between appellants and his arrest, this deficiency alone probably renders the evidence legally insufficient to support the elements of his section 1983 and false imprisonment claims. Nonetheless, because we reach the same results on other grounds, we will assume for the sake of argument that the form, content, and genesis of the Eagle Lake complaint and warrant were the same as that of the Columbus documents.

APPENDIX H

Texas Supreme Court Denial of Writ of Error

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

January 31, 1997

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The Honorable Dan Morales
Attorney General of Texas
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Austin, TX 78711-2548

RE: Case Number 96-1113
Style: H. SCOTT BORLAND
v.
ERNEST A. EMERSON, QUAY WOOD, BRIAN McRAE, GLENN ZOCH, and LOUIS diDONATO

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Sincerely,

John T. Adams, Clerk

by_____
Blanca E. Morin, Deputy